TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 151.

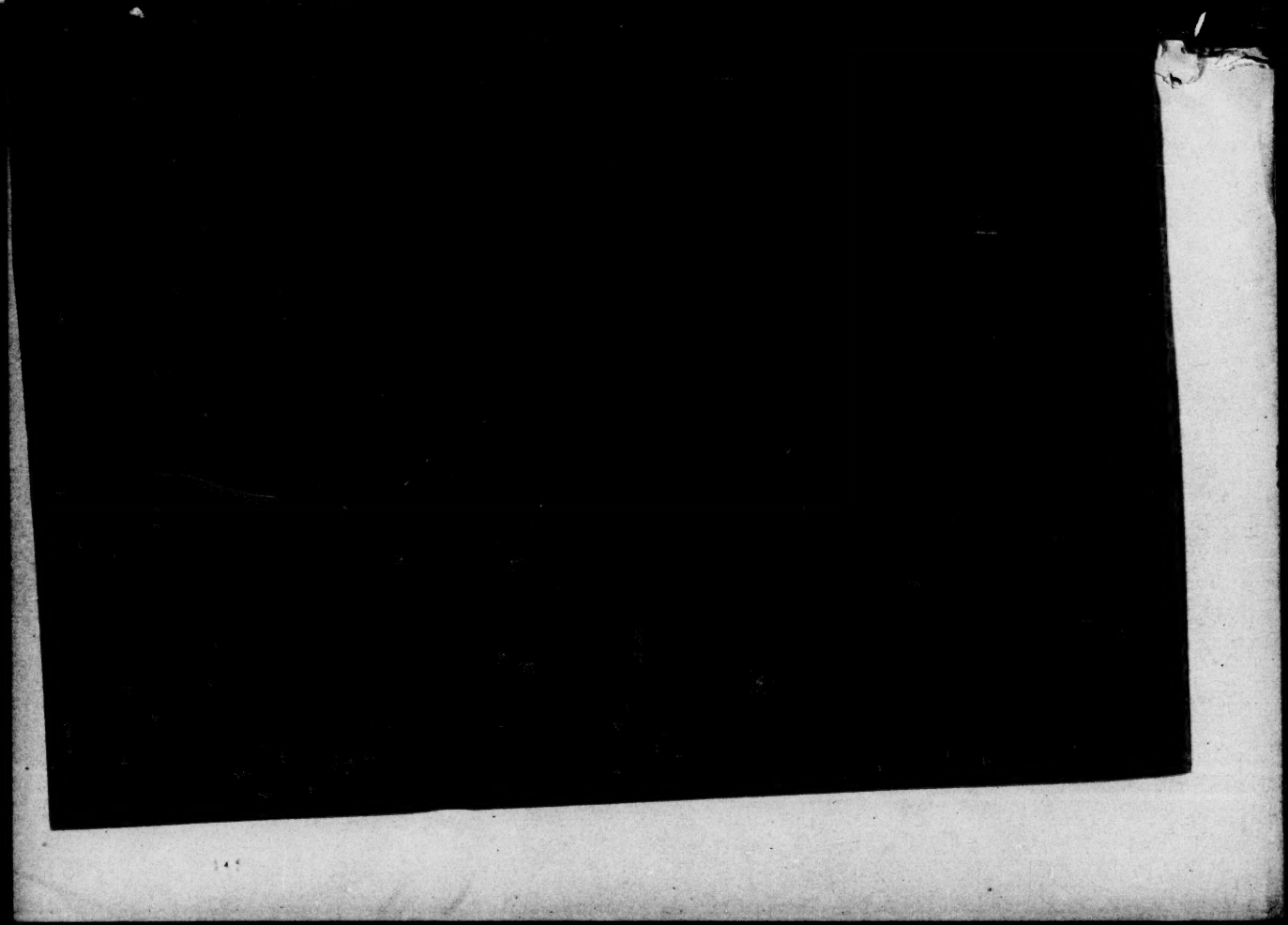
WILLIAM R. UTLEY, GEORGE W. DOUGHERTY, AND ALBERT L. SCOTT, PLAINTIFFS IN ERROR,

vs.

JOHN W. DONALDSON AND MOSES FRALEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 15, 1874.



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a UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable judges of the circuit court of the United States for the eastern district of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the March term, 1874, thereof, between William R. Utley, George W. Dougherty, and Albert L. Scott, plaintiffs, and John W. Donaldson and Moses Fraley, defendants, a manifest error hath happened to the great damage of the said William R. Utley, George W. Dougherty, and Albert L. Scott, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court to be then and there held; that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this tenth day of April, in the year of our Lord one thousand eight hundred and seventy-four.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

AUSTIN DRAKE,
Clerk C. C. U. S. East Dist. Mo.,
By H. C. GEISBERG,
Deputy.

Allowed by—

JOHN F. DILLON,
Judge.

UNITED STATES OF AMERICA,
Eastern District of Missouri, sct:

In obedience to the within writ, I herewith send to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-mentioned case, with all things concerning the same.

Witness my hand, at office in the city of St. Louis in said district, this eighteenth day of June, A. D. 1874.

AUSTIN DRAKE,
Clerk of said Circuit Court,
By H. C. GEISBERG,
Deputy

(Indorsed:) United States circuit court, eastern district of Missouri. Wm. R. Utley et al., plffs. in error, *vs.* John W. Donalson et al., dfts. in error. Writ of error to the circuit court of the United States for the eastern district of Missouri. Returned and filed . 187 . , clerk.

b The United States of America to John W. Donaldson and Moses Fraley, greeting :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error, filed in the circuit court of the United States for the eastern district of Missouri, wherein William R. Utley, George W. Dougherty, and Albert L. Scott are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable John F. Dillon, judge of the circuit court of the United States for the eastern district of Missouri, this tenth day of April, in the year of our Lord one thousand eight hundred and seventy-four.

JOHN F. DILLON,
Judge United States Circuit Court, Eastern District of Missouri.

(Indorsed:) United States circuit court, eastern district of Missouri. Wm. R. Utley et al., plffs. in error, vs. John W. Donaldson et al., dfts. in error. Citation. Filed , 187 . , clerk.

I acknowledge due service of the within citation.

KRUM & PATRICK,
Attys. for Defts.

ST. LOUIS, *June* 27, 1874.

1 UNITED STATES OF AMERICA,
Eastern District of Missouri, sct :

Pleas before the honorable the circuit court of the United States in and for the eastern district of Missouri at the March term thereof, A. D. 1874.

WILLIAM R. UTLEY ET AL., PLAINTIFFS,
vs.
JOHN W. DONALDSON ET AL., DEFENDANTS.

Be it remembered that heretofore, to wit, on the 28th day of August, A. D. 1872, there was filed in the office of the clerk of the circuit court of the United States for the eastern district of Missouri a petition in words and figures following, to wit:

Petition.

WILLIAM R. UTLEY, GEORGE W. DOUGHerty, & Albert L. Scott, plaintiffs,
vs.
JOHN W. DONALDSON, & MOSES FRALEY, defendants.

UNITED STATES OF AMERICA,
Eastern District of Missouri :

In the circuit court of the United States for said eastern district of Missouri, October term, 1872.

The plaintiffs above-named, for their cause of action against the above-named defendants, complain and state as follows, to wit:

That at the dates hereinafter mentioned, plaintiffs who were and are

citizens of the State of New York composed the firm and copartnership of Utley, Dougherty and Scott, doing business as bankers and brokers in the city of New York, in said State of New York, and
2 there residing; that at said times the defendants were and still are citizens of the State of Missouri, and composed the firm and copartnership of Donaldson and Fraley, doing business as bankers and brokers, in the city of St. Louis, in said State of Missouri, and there residing.

Plaintiffs further state that on the 25th day of May, 1871, defendants agreed and contracted to sell and forthwith deliver to plaintiffs, at said city of New York, fifteen (15) bonds bonds, each of the denomination of one thousand dollars, ($1,000,) payable in gold, with coupons thereto attached for the interest thereon at the rate of six (6) per cent. per annum, payable in gold on the first days of January and July in each and every year until the maturity thereof, issued by the Central Pacific Railroad Company, and secured by a first (1st) mortgage on the property thereof, said fifteen bonds so agreed and contracted to be delivered to have attached thereto the coupons for the semi-annual interest due thereon on the first day of July, 1871, and all other coupons thereafter to become due thereon, said bonds being known as Central Pacific first-mortgage bonds, for which said fifteen bonds, plaintiffs agreed and contracted to pay at the rate and price of one hundred and two dollars and fifty cents ($102.50) for each and every one hundred dollars of nominal value thereof, to wit, for the whole of said fifteen (15) bonds, the price and sum of fifteen thousand three hundred & seventy-five ($15,375) dollars. Plaintiffs state that, in accordance with their said agreement and contract, they paid to said defendants, on the 29th day of May, 1871, and defendants received from them in full payment for said fifteen (15) bonds so contracted for, the said sum of fifteen thousand three hundred and seventy-five ($15,375) dollars, being the price therefor agreed to be paid as aforesaid; but plaintiffs state
3 that, though often requested so to do, defendants have utterly failed, neglected, and refused, and still do fail, neglect, and refuse, to deliver said bonds as agreed and contracted, to the great damage, loss, and injury of plaintiffs.

Wherefore, plaintiffs ask judgment against defendants for said sum so by said plaintiffs paid to said defendants, to wit, the sum of fifteen thousand three hundred and seventy-five dollars, ($15,375,) with interest thereon from said 29th day of May, A. D. 1871.

S. M. BRECKINRIDGE,
For Plffs.

And thereupon a summons issued, in words & figures following, to wit:

Summons.

EASTERN MISSOURI DISTRICT, *sct:*

The President of the United States of America, to the marshal of the eastern district of Missouri, greeting:

You are hereby commanded to summon John W. Donaldson and Moses Fraley, citizens of the State of Missouri, that they be and appear before the honorable circuit court of the United States for the eastern district of Missouri, on the first day of the next term thereof, to be holden at the city of St. Louis, in and for said district, on the third Monday of September next, then and there to answer the complaint of William R. Utley, George W. Dougherty, and Albert L. Scott, citizens

of the State of New York, as set forth in the petition filed in said court, on the twenty-eighth day of August, A. D. eighteen hundred and seventy-two. Hereof fail not, and have you then and there this writ.

Witness the honorable Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, the twenty-eighth day of August, A. D. eighteen hundred and seventy-two. Issued at office in the city
4 of St. Louis, under the seal of said court, the day and year last aforesaid.

[SEAL.] AUSTIN DRAKE,
Clerk of said Court.

Upon which summons said marshal made return in words and figures following, to wit:

Marshal's return.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

Executed this writ by delivering a copy of the summons, together with a copy of the petition, to the within-named Moses Fraley, and by delivering a copy of the summons to the within-named John W. Donaldson, at St. Louis, within the eastern district of Missouri, August 29th, 1872.

C. A. NEWCOMB,
U. S. Marshal, E. D. Mo.
By J. SAUER, *Deputy.*

And at the September term, A. D. 1872, of said circuit court, the following proceedings were had in this cause on Monday, the 16th day of September, A. D. 1872, to wit:

WILLIAM R. UTLEY ET AL., PLAINTIFFS,
vs.
JOHN W. DONALDSON ET AL., DEFENDANTS. } Petition.

This day come the defendants by their attorneys, Messrs. Krum and Patrick, and enter their appearance herein.

The appearance entered as aforesaid in the words and figures following, to wit:

Appearance of defts.

WM. R. UTLEY ET AL., PLAINTIFFS,
vs.
JOHN W. DONALDSON ET AL., DEFENDANTS.

5 In the circuit court of the United States of America, for the eastern district of Missouri.

Now come the defendants herein and enter their appearance by

KRUM & PATRICK,
Attys. for Defts.

And afterwards, at said September term, A. D. 1872, of said circuit court, the following further proceedings were had in this cause on Thursday, the 19th day of September, A. D. 1872, to wit:

WILLIAM R. UTLEY ET AL., PLAINTIFFS,
vs.
JOHN W. DONALDSON ET AL., DEFENDANTS. } Petition.

This day come the defendants, by their attorneys, and file their answer to the petition of said plaintiffs herein.

The answer filed as aforesaid is in the words and figures following, to wit:

Answer.

UNITED STATES OF AMERICA,
Eastern District of Missouri:

WILLIAM R. UTLEY, GEORGE W. DOUGHERTY, and Albert L. Scott, plffs.,
vs.
JOHN W. DONALDSON & MOSES FRALEY, defts.

In the circuit court for the eastern district of Missouri, October term, 1872.

The above-named defendants, for answer to plaintiffs' petition, state: That on or about the 25th day of May, A. D. 1871, defendants sold plaintiffs fifteen first-mortgage bonds of the Central Pacific Railroad Company, each of the denomination of one thousand dollars, for which plaintiffs agreed and contracted to pay defendants at the rate and price of one hundred and two $\frac{50}{100}$ dollars for each and every one hun-
6 dred dollars of nominal value thereof, to wit, for the whole fifteen bonds the price and sum of fifteen thousand three hundred and seventy-five dollars, deliverable to plaintiffs at the city of New York, to wit: On the 29th day of May, A. D. 1871, defendants by letter notified plaintiffs that said fifteen Central Pacific Railroad bonds, with a draft for the purchase-money therefor thereto attached, were at the Bank of North America, in said city, awaiting acceptance from plaintiffs, but that defendants had purchased said bonds from a stranger to them, and *and* as they had never handled any of the Central Pacific Railroad bonds before, they would only sell said bonds to plaintiffs, without recourse upon them, the defendants, as to their being genuine; that therefore they, the plaintiffs, would please examine said bonds, and, if they were found to be correct, telegraph immediately to defendants, "Centrall all O. K.;" said notification from them stating that it was given as a precaution, defendants not being willing to take any risk; that plaintiffs, after said notification by letter had been received by them, procured and accepted a delivery of said bonds from said Bank of North America, in New York, paid said draft for the purchase-money due for said bonds, amounting to fifteen thousand three hundred and seventy-five dollars, and immediately thereupon, in pursuance of said notification, both telegraphed and wrote to defendants, with respect to said bonds, "Centrals all right;" that the foregoing is the only sale of Central Pacific Railroad bonds ever made by these defendants to plaintiffs, and the same sale of bonds mentioned and described in plaintiffs' petition and none other, and so defendants aver that they did deliver said bonds to plaintiffs, and that the same were accepted by plaintiffs from defendants; wherefore defendants ask to hence dis-
7 missed, and for their costs in this behalf expended.

KRUM & PATRICK,
Attys. for Defts., &
WM. R. DONALDSON,
Atty. for Defts.
MOSES FRALEY.

U. S. OF AMERICA,
East Dist. of Mo.:

Sworn to and subscribed before me this 19th day of September, A. D. 1872.

H. C. GEISBERG,
U. S. Com'r Mo. Dists.

And afterwards, at said September term, A. D. 1872, of said circuit court, the following further proceedings were had in this cause on Saturday, the 21st day of September, A. D. 1872, to wit:

WILLIAM R. UTLEY ET AL., PLAINTIFFS,
vs.
JOHN W. DONALDSON ET AL., DEFENDANTS. } Petition.

This day come the plaintiffs, by their attorney, and file a demurrer to the answer filed by the defendants.

The demurrer filed as aforesaid is in the words and figures following, to wit:

Demurrer to answer.

UNITED STATES OF AMERICA,
Eastern District of Missouri:

WILLIAM R. UTLEY, GEORGE W. DOUGHERTY, & Albert L. Scott, plaintiffs,
vs.
JOHN W. DONALDSON & MOSES FRALEY, defendants.

In the circuit court for the eastern district of Missouri, October term, 1872.

And now come the said plaintiffs, and say that the said plea by the said defendants pleaded, in manner and form as pleaded, and the matter therein contained and set forth, are not sufficient in law, and that
8 the plaintiffs are not bound to reply to the same, and this they are ready to verify; wherefore they ask judgment.

And they show to the court here the following special causes of demurrer:

1st. That said plea neither denies nor confesses and avoids the facts alleged in the declaration.

2nd. It is a mere recital of evidence, so far as it attempts to set up new matter.

3d. It is subject to the objection of duplicity, in this, that it joins in one and the same plea matter which amounts, argumentatively, to a denial of the facts set forth in the declaration and matter in confession and avoidance.

S. M. BRECKINRIDGE,
Atto. for the Plaintiffs.

And afterwards, at said September term, A. D. 1872, of said circuit court, the following further proceedings were had in this cause on Tuesday, the 1st day of October, A. D. 1872, to wit:

WILLIAM R. UTLEY ET AL., PLAINTIFFS,
vs.
JNO. W. DONALDSON ET AL., DEFENDANTS. } Petition.

This day come the parties, by their respective attorneys, and thereupon the questions of law arising upon the demurrer to the answer of the defendants were argued by said attorneys and submitted; and the court, not being fully advised in the premises, takes further time to consider thereof.

And afterwards, at said September term, A. D. 1872, of said circuit court, the following further proceedings were had in this cause on Friday, the 4th day of October, A. D. 1872, to wit:

9 WILLIAM R. UTLEY ET AL., PLAINTIFFS,
vs.
JOHN W. DONALDSON ET AL., DEFENDANTS. } Petition.

The court having examined the questions of law arising upon the demurrer to defendants' answer, and being now fully advised in the premises, is of opinion that the law upon said demurrer is for said plaintiffs, and, in accordance with such opinion, it is ordered that said demurrer be, and the same is, hereby sustained. And thereupon said defendants file their amended answer herein.

The amended answer filed as aforesaid is in the words & figures following:

Amended answer.

UNITED STATES OF AMERICA,
Eastern District of Missouri:

WILLIAM R. UTLEY, GEORGE W. DOUGHERTY, & Albert L. Scott, plffs.,
vs.
JOHN W DONALDSON & MOSES FRALEY, defts.

In the circuit court of the United States for the eastern district of Missouri, October term, 1872.

The above-named defendants for their amended answer herein admit that on or about the 25th day of May, A. D. 1871, defendants sold to plaintiffs the said fifteen first-mortgage bonds of the Central Pacific Railroad Company for the sum and price of fifteen thousand three hundred and seventy-five dollars, as alleged. Defendants further admit that plaintiffs paid defendants said price for said bonds. Defendants for further answer herein aver, that at the city of New York they delivered to plaintiffs, without recourse upon them, defendants, should the same not be genuine, the said fifteen Central Pacific Railroad bonds sold by these defendants to plaintiffs as aforesaid, and that plaintiffs then and there agreed to accept and did accept said bonds without recourse upon defendants as to their genuineness.

10 Wherefore defendants pray to be dismissed.

KRUM & PATRICK & WM. R. DONALDSON,
Attys. for Defts.

MOSES FRALEY.

U. S. OF AMERICA, *East. Dist. of Mo.:*

Sworn to and subscribed before me this 4th day of October, A. D. 1872.

H. C. GEISBERG,
U. S. Commr. E. D. Mo.

And afterwards, at said September term, A. D. 1872, of said circuit court, the following further proceedings were had in this cause on Wednesday, the 9th day of October, A. D. 1872, to wit:

WILLIAM R. UTLEY ET AL., PLAINTIFFS,
vs.
JOHN W. DONALDSON ET AL., DEFENDANTS. } Petition.

This day come the plaintiffs, by attorney, and, by consent of defend ants' attorneys, file their demurrer to the amended answer of said defendants.

The demurrer filed as aforesaid is in the words and figures following, to wit:

Demurrer to amd'd. ans.

UNITED STATES OF AMERICA,
Eastern District of Missouri:

WILLIAM R. UTLEY, GEORGE W. DOUGHERTY, & Albert L. Scott, plaintiffs,
vs.
JOHN W. DONALDSON & MOSES FRALEY, defendants.

In the circuit court for the eastern district of Missouri, October term, 1872.

And now come the said plaintiffs and say that the said amended answer of the said defendants is insufficient in law, and that the said plaintiffs are not bound to reply to the same.

11 Wherefore they ask judgment.

And the said plaintiffs assign the following causes of demurrer:

1. The said amended answer does not state facts sufficient to bar the plaintiff from maintaining his said action.
2. It amounts simply to a denial of the facts alleged in the petition.
3. It neither denies nor confesses and avoids the case made in the petition.
4. It is not issuable in this, that it attempts to deny the facts set out in the petition and avoid the same in the same answer.

S. M. BRECKINRIDGE,
Atto. for the Plaintiff.

And afterwards, at said September term, A. D. 1872, of said circuit court, the following further proceedings were had in this cause on Thursday, the 10th day of October, A. D. 1872, to wit:

WILLIAM R. UTLEY ET AL., PLAINTIFFS,
vs.
JOHN W. DONALDSON ET AL., DEFENDANTS. } Petition.

This day come the parties, by their respective attorneys, and thereupon the questions of law arising upon the demurrer to the amended answer of the defendants were argued by counsel and submitted; and the court being now fully advised in the premises, is of opinion that the law upon said demurrer is for the defendants; and in accordance with

such opinion, it is ordered that said demurrer be, and the same is now hereby, overruled. And thereupon, on motion of the attorney for said plaintiffs, leave is granted said plaintiffs to amend their petition, or reply to said amended answer during this term.

And afterwards, at said September term, A. D. 1872, of said
12 circuit court, the following further proceedings were had in this cause on Monday, the 21st day of October, A. D. 1872, to wit:

WILLIAM R. UTLEY ET AL., PLAINTIFFS,
vs.
JOHN W. DONALDSON ET AL., DEFENDANTS. } Petition.

This day come the plaintiffs, by their attorney, and file their amended petition against said defendants; and also a stipulation of counsel, agreeing that defendants may answer or demur to said amended petition during vacation.

The amended petition, filed as aforesaid, is in the words and figures following, to wit:

Amended petition.

UNITED STATES OF AMERICA,
Eastern District of Missouri:

WILLIAM R. UTLEY, GEORGE W. DOUGHERTY, & ALBERT L. SCOTT, plaintiffs,
vs.
JOHN W. DONALDSON & MOSES FRALEY, defendants.

In the circuit court of the United States for said eastern district of Missouri, October term, 1872.

The plaintiffs above named, for their cause of action against the above-named defendants, complain and state as follows, to wit:

That at the dates hereinafter mentioned, plaintiffs, who were and are citizens of the State of New York, composed the firm and copartnership of Utley, Dougherty & Scott, doing business as bankers and brokers in the city of New York, in said State of New York, and there residing.

That at the said times the defendants were, and still are, citizens of the State of Missouri, and composed the firm and copartnership of Donaldson & Fraley, doing business as bankers and brokers in the city of St. Louis, in said State of Missouri, and there residing.

Plaintiffs further state, that on the 25th day of May, 1871, defend-
ants agreed and contracted to sell and forthwith deliver to
13 plaintiffs at said city of New York, fifteen (15) bonds, each of the denomination of one thousand ($1,000) dollars, payable in gold, with coupons thereto attached for the interest thereon at the rate of six (6) per cent. per annum, payable in gold, on the first days of January & July in each and every year until the maturity thereof, issued by the Central Pacific Railroad Company and secured by a first (1st) mortgage on the property thereof, said fifteen (15) bonds so agreed and contracted to be delivered to have attached thereto the coupons for the semi-annual interest due thereon on the first day of July, A. D. 1871, and all other coupons thereafter to become due thereon, said bonds being known as Central Pacific first-mortgage bonds; for which said fifteen bonds plaint-

iffs agreed and contracted to pay at the rate and price of one hundred and two dollars and fifty cents ($102.50) for each and every one hundred dollars of nominal value thereof, to wit, for the whole of said fifteen (15) bonds the price and sum of fifteen thousand three hundred and seventy-five ($15,375) dollars. Plaintiffs state that in accordance with the said agreement and contract, they paid to said defendants on the 29th day of May, A. D. 1871, and defendants received from them in full payment for said fifteen (15) bonds so contracted for, the said sum of fifteen thousand three hundred and seventy-five ($15,375) dollars, being the price therefor agreed to be paid as aforesaid, and that thereupon defendants delivered to said plaintiffs fifteen (15) certain papers purporting to be, and so by defendants represented, said fifteen genuine bonds of the character and denomination aforesaid, of the said Central Pacific Railroad Company, and purporting to be of series J., and numbered respectively, 17476, 17481, 17482, 17490, 17496, 17503, 17603, 17610, 17611, 17623, 17628, 17627, 17620, 17702, and 18107, which were by said defendants delivered, and by said plaintiffs received as the
14 genuine bonds of the character and denomination aforesaid, which by their said contract said defendants agreed to deliver, and which were by said plaintiffs received with the express understanding that they were the said genuine bonds so contracted for.

Plaintiffs state that said papers so by them received as, and believed to be, fifteen (15) genuine bonds such as were contracted for as aforesaid by and between said plaintiffs and defendants, were not what they were represented and purported to be, but were soon thereafter to wit, on the day of , A. D. 1871, found to be and are false, forged, spurious, and counterfeit and wholly without value.

Plaintiff states, immediately on making said discovery that said supposed bonds were counterfeit, plaintiffs so informed defendants, and demanded repayment of said sum of $15,375, so by them paid therefor, but plaintiffs state that said defendants have utterly failed and refused, and do still fail and refuse to repay said sum of $15,375.

Wherefore plaintiffs state that, by reason of the delivery to them by said defendants of said papers supposed to be said bonds as aforesaid, but in fact counterfeit, the consideration for the said payment of said sum of $15,375 has entirely failed, and they have been thereby greatly damaged.

Wherefore, plaintiffs ask judgment against defendants for said sum so by said plaintiffs paid to said defendants, to wit, the sum of fifteen thousand three hundred and seventy-five, ($15,375,) with interest thereon from said 29th day of May, A. D. 1871.

S. M. BRECKINRIDGE,
For Plffs.

The stipulation filed as aforesaid is in the words & figures following, to wit:

Stipulation.

UTLEY ET AL.
vs.
DONALDSON ET AL.

15 Circuit court, U. S., October term, 1872.

It is understood and agreed that defendants' counsel may file answer at their convenience during the vacation, & that the issues may be made up in vacation.

S. M. BRECKINRIDGE,
Plffs'. Counsel.

And afterwards, in vacation of said circuit court, the following further proceedings were had in this cause on Tuesday, the 24th day of June, A. D. 1873, to wit:

WILLIAM R. UTLEY ET AL., PLAINTIFFS,
vs.
JOHN W. DONALDSON ET AL., DEFENDANTS. } Petition.

This day come the defendants, by their attorneys, and by consent of plaintiffs' attorney, file their answer to the amended petition herein.

The answer filed as aforesaid is in the words and figures following,

Answer to am'd'd petition.

UNITED STATES OF AMERICA,
Eastern District of Missouri:

WILLIAM R. UTLEY ET AL., PLFFS.,
vs.
JOHN W. DONALDSON ET AL., DEFTS.

In the circuit court of the United States for the eastern district of Missouri, October term, 1872.

The above-named defendants, for answer to plaintiffs' amended petition: herein deny and say it is not true that they contracted to deliver to plaintiffs the fifteen bonds described in the petition; but defendants admit that on or about the 25th day of May, A. D. 1871, they sold and contracted to deliver to plaintiffs fifteen first-mortgage bonds of the Central Pacific Railroad Company, for the sum and price of
16 fifteen thousand three hundred and seventy-five dollars, and that the plaintiffs paid defendants said price for said bonds. For further answer defendants aver, that before the payment of said price, they at the city of New York delivered to plaintiffs without recourse upon them, the defendants, should the same not be genuine, the said fifteen Central Pacific Railroad bonds sold by defendants to plaintiffs as hereinbefore averred, and that plaintiffs then and there did accept said bonds from the defendants without recourse upon them as for genuineness, and at their, plaintiffs', risk as to the genuineness of said bonds.

Defendants state that they have not knowledge or information sufficient to form a belief as to *the* whether the bonds alleged in the amended petition to have been delivered by defendants to plaintiffs, were numbered as alleged, nor as to whether the same were false, forged, spurious, and counterfeit bonds; and therefore call for proof thereof.

And defendants deny that the sum and price of said bonds was paid by plaintiffs, and that the said bonds were received by plaintiffs with the express understanding that they were genuine bonds; and defendants deny that they represented to plaintiffs that said bonds were genuine; but, on the contrary, defendants aver that said bonds were delivered to and received by plaintiffs with the express understanding that they would be delivered to plaintiffs at plaintiffs' risk as to genuineness, and without recourse as to genuineness upon defendants.

Wherefore defendants pray to be hence dismissed with their costs.

KRUM & PATRICK & WM. R. DONALDSON,
Attys. for Defts.

17 And afterwards, at the September term, A. D. 1873, of said circuit court, the following further proceedings were had in this cause on Saturday, the 20th day of September, A. D. 1873, to wit:

WILLIAM R. UTLEY ET AL., PLAINTIFFS,
vs.
JOHN W. DONALDSON ET AL., DEFENDANTS. } Petition.

This day come the parties, by attorneys, and file an agreement in writing waiving a jury herein.

The agreement, filed as aforesaid, is in the words and figures following:

Jury waiver.

WM. R. UTLEY ET AL.
vs.
J. W. DONALDSON ET AL.

U. S. circuit court, September term, 1873.

It is hereby stipulated between the parties to this cause, that the same may be tried by the court without a jury.

S. M. BRECKINRIDGE,
Atty. for Plffs.
KRUM & PATRICK,
Attys. for Defts.

And afterwards, at the March term, A. D. 1874, of said circuit court, the following further proceedings were had in this case, on Friday, the 20th day of March, A. D. 1874, to wit:

WILLIAM R. UTLEY ET AL., PLAINTIFFS,
vs.
JOHN W. DONALDSON ET AL., DEFENDANTS. } Petition.

This day come the plaintiffs, by attorney, and by consent file their replication to the answer of the defendants; and thereupon the defendants, by their attorneys, file a motion to strike out parts of said replication, which motion is submitted to the court upon briefs.

18 The replication filed as aforesaid is in the words and figures following, to wit:

Replication.

WILLIAM R. UTLEY ET AL., PLFFS.,
vs.
JOHN W. DONALDSON ET AL., DEFTS.

In the circuit court of the United States, eastern district of Missouri, March term, A. D. 1874.

And now come the said plaintiffs, and, for reply to the answer of the said defendants filed herein, say that they ought not to be barred by anything in the said answer contained, because they say that it is not true, as in the said answer alleged, that upon the payment of the price

of said bonds, in plaintiffs' petition mentioned, at the city of New York or at any other place, defendants delivered said fifteen (15) Central Pacific Railroad bonds mentioned and described in plaintiffs' petition herein, without recourse upon the defendants should the same not be genuine.

That it is not true, as in said answer alleged, that the plaintiffs, at the time fixed in said answer or at any time, did accept and receive the said fifteen (15) Central Pacific Railroad bonds from the defendants, without recourse upon the said defendants as to genuineness, and at the plaintiffs' risk as to the genuineness of said bonds.

That it is not true, as in said answer alleged, that said bonds were delivered to and received by the plaintiffs, with the express understanding or with any understanding that they should be delivered to plaintiffs at plaintiffs' risk as to genuineness, and without recourse as to genuineness upon the defendants.

For further replication, plaintiffs say that it is not true, as in said answer alleged, that the said defendants did not have knowledge or information sufficient to form a belief as to whether the said bonds were false, forged, spurious, and counterfeit.

19 And the plaintiffs aver that at the time of the contract for the sale of said bonds, and at the time of the delivery of the same by the defendants to the plaintiffs, the defendants had reason to believe, and did believe, that the said bonds were not genuine Central Pacific Railroad bonds.

Wherefore the plaintiffs pray judgment.

S. M. BRECKINRIDGE,
Atto. for Plffs.

The motion to strike out, filed as aforesaid, is in the words and figures following, to wit:

Motion to strike out.

WILLIAM R. UTLEY ET AL., PLFFS.,
vs.
JOHN W. DONALDSON ET AL., DEFTS.

In the circuit court of the United States, eastern district of Missouri.

Now come the above-named defendants, and move this honorable court to strike out of defendants' replication all that portion of the same between the 25th and 29th lines thereof, reading as follows: "And the plaintiffs aver that at the time of the contract for the sale of said bonds, and at the time of the delivery of the same by the defendants to the plaintiffs, the defendants had reason to believe, and did believe, that the said bonds were not genuine Central Pacific Railroad bonds."

Because the matter therein set forth is a departure from the cause of action made up in plaintiffs' petition.

Because the plaintiffs, in their petition, seek to recover upon the ground that it was expressly agreed between plaintiffs and defendants that the bonds sold were genuine, and the replication seeks to superadd a new ground of recovery, i. e., fraud, in this, that at the time of the contract, and also of the delivery, defendants knew the bonds they were selling were spurious; said replication thereby being, in that respect, a departure from plaintiffs' petition.

KRUM & PATRICK & W. R. DONALDSON,
For Defts.

20 And afterwards, at said March term, A. D. 1874, of said circuit court, the following further proceedings were had in this cause on Monday, the 23d day of March, A. D. 1874, to wit:

WILLIAM R. UTLEY ET AL., PLAINTIFFS,
vs.
JOHN W. DONALDSON ET AL., DEFENDANTS. } Petition.

This day come the parties, by their attorneys, and the court having considered the motion hereinbefore filed to strike out certain portions of plaintiffs' replication to defendants' answer, and being fully advised in the premises, it is ordered that said motion be overruled.

And afterwards, at said March term, A. D. 1874, of said circuit court, the following further proceedings were had in this cause on Thursday, the 26th day of March, A. D. 1874, to wit:

WILLIAM R. UTLEY ET AL., PLAINTIFFS,
vs.
JOHN W. DONALDSON ET AL., DEFENDANTS. } Petition.

This day come the parties, by their respective attorneys, the plaintiff by Samuel M. Breckinridge, esquire, and the defendants by Messrs. Krum & Patrick, and this case being regularly called for trial, and both parties being ready, and an agreement having been filed, signed by counsel, consenting to waive a jury, and that the issues be tried by the court sitting as a jury, the hearing of the evidence was commenced and proceeded with, but the same not having been concluded at the hour of adjournment, it is ordered that further proceedings herein be continued until to-morrow morning.

21 And afterwards, at said March term, A. D., 1874, of said circuit court, the following further proceedings were had in this case on Friday, the 27th day of March, A. D. 1874, to wit:

WILLIAM R. UTLEY ET AL., PLAINTIFFS,
vs.
JOHN W. DONALDSON ET AL., DEFENDANTS. } Petition.

This day come again the parties, by their respective attorneys, as on yesterday, whereupon the hearing of the evidence was resumed, and at the conclusion thereof the case was argued by counsel, but such argument not having been concluded, it is ordered that further proceedings be continued until to-morrow morning.

And afterwards, at said March term, A. D. 1874, of said circuit court, the following further proceedings were had in this cause on Saturday, the 28th day of March, A. D. 1874, to wit:

WILLIAM R. UTLEY ET AL., PLAINTIFFS,
vs.
JOHN W. DONALDSON ET AL., DEFENDANTS. } Petition.

This day come again the parties, by their respective attorneys, as on yesterday, whereupon the arguments of counsel were resumed, and at the conclusion the case was submitted to the court upon the pleadings and proofs, and, not being fully advised in the premises, the court takes further time to consider thereof.

And afterwards, at said March term, A. D. 1874, of said circuit court, the following further proceedings were had in this cause on Friday, the 3d day of April, A. D. 1874, to wit:

Judgment.

WILLIAM R. UTLEY ET AL., PLAINTIFFS,
vs.
JOHN W. DONALDSON ET AL., DEFENDANTS. } Petition.

22 This day come again the parties by their respective attorneys, and this cause having been submitted to the court, sitting as a jury at a former day of this term, upon the pleadings and proofs, and being now fully advised in the premises, the court finds for the defendants, on the issues joined herein, and returns a special finding of the facts as proven on the trial of this case, which is filed and ordered to be made a part of the record in this case.

It is therefore now considered by the court that the plaintiffs, William R. Utley, George W. Dougherty, and Albert L. Scott, take nothing by their writ herein, and that the defendants, John W. Donaldson and Moses Fraley, go hence without day and recover against said plaintiffs the costs in this behalf expended, and that execution or a fee-bill be issued therefor.

The special finding of the facts returned by the court as aforesaid is in the words and figures following, to wit:

Circuit court of the U. S. for the eastern district of Missouri, Mar. term, 1874.

Special findings of fact by the court.

WILLIAM R. UTLEY ET AL., PLFFS.
vs.
JOHN W. DONALDSON ET AL., DEFTS.

Findings of facts by the court & bill of exceptions:

Be it remembered that from the evidence the court (a jury trial having been waived in writing and duly filed) finds the following facts:

1. On the 24th day of May, A. D. 1871, Newman and Havens, bankers, of Leavenworth, Kansas, telegraphed to St. Louis from Leavenworth to W. Nichols, cashier of the Commercial Bank of St. Louis, as follows:

"Get rate for fifteen thousand dollars California Central Pacific R. R. bonds, delivered to-morrow."

23 This dispatch was, on said 24th day of May, 1871, shown by Nichols to defendants, and defendants made a bid for said bonds, i. e. (100½) one hundred and one-half. This offer was reported by telegraph to Newman & Havens by Nichols, and was by Newman & Havens accepted by telegraph.

2. On the following day, May 25th, 1871, said Nichols received from Newman & Havens, from Leavenworth, a letter, as follows:

"LEAVENWORTH, KANSAS,
"*24th May*, 1876.

"W. NICHOLS, Esq., *Cash.*,
"*St. Louis, Mo.:*

"DEAR SIR: Your favor of the inst., with inclosure as stated, is received. We, this a.m., telegraphed you as follows, viz: 'Get rate for fifteen thousand dolls. California Central Pacific R. R. bonds, delivered

to-morrow.' Same is hereby confirmed. We herewith hand you bonds. Please close the transaction and telegraph us immediately. The party selling these bonds is waiting here to get the money for them. This same gentleman is an entire stranger to us, therefore will you be kind enough to satisfy yourself that the bonds are all right. We desire them sold without any recourse on us. Your early attention will much oblige, respectfully, yours,

"NEWMAN & HAVENS."

This letter accompanied fifteen papers, purporting to be so many bonds in said letter described.

W. Nichols, cashier, handed this letter to defendants May 25th, 1871, with the bonds, and proposed that the defendants should take said
24 bonds without recourse. Defendants refused to take the bonds without recourse, but said they would do this, viz: Would give to the Commercial Bank their, defendants', check for the agreed amount, $15,075.00, with the understanding that this check was not to be charged up by the Commercial Bank, where defendants kept their accounts, until defendants had sent the bonds to New York and learned that the bonds were ("O. K.") correct. If the bonds were found to be correct, the check was to be charged up against defendants, and Newman & Havens to be advised; if not, the bonds were to be returned to the Commercial Bank and the check returned to defts.

3. On the 24th of May, 1871, defts. having received invitation to make a bid from Nichols, as requested by Newman and Havens in their dispatch, telegraphed to plaintiffs by night dispatch as follows:

"ST. LOUIS, *May* 24, 1871.

"To UTLEY, DOUGHERTY & SCOTT:

"Make best bid fifteen Central Pacifics quick.

"DONALDSON & FRALEY."

After sending this dispatch, and before receiving reply thereto, to wit, on the morning of May 25th, defts. were shown by Nichols the letter of May 24th from Newman & Havens above recited & the bonds.

Plaintiffs received this dispatch, and on the 25th day of May, 1871, replied by dispatch, as follows:

"NEW YORK, *May* 25, '71.

"To DONALDSON & FRALEY:

"We will buy Central Pacifics at a hundred and two and a half (102½.)

"UTLEY, DOUGHERTY & SCOTT."

25 Defendants received this dispatch on the same day about 10 a. m., and on the same day replied by telegraphic dispatch, as follows:

"ST. LOUIS, *May* 25, 1871.

"To UTLEY, DOUGHERTY AND SCOTT,

"*New York:*

"We accept your offer, fifteen Centrals one hundred two and a half.

"DONALDSON & FRALEY."

4. On the same day plffs. wrote and mailed a letter to defts., as follows:

"NEW YORK, *May* 25, '71.

"DEAR SIRS: Your telegram of to-day recd. You have sold us 15 thousand Central Pacific 6's at 102½ flat. * * * *

"Resp'fully yours,

"UTLEY, DOUGHERTY & SCOTT."

The fifteen bonds were delivered to defts. by Nichols, cashier of Commercial Bank, May 25th, and were by defts. forwarded by express on the same day to the Bank of North America, New York, with a draft on plffs. for $15,375, the bonds to be delivered by the bank to plffs. on payment of the draft. By mail—mailed by defts. On the morning of the 25th of May defts. sent to plaintiffs a letter, as follows:

"ST. LOUIS, *May 25th* 1871.

"Messrs. UTLEY, DOUGHERTY & SCOTT:

"GENTLEMEN: In accordance with your offer for 15 Central
26 Pac. 1st mort. bonds, 102½, we replied, we accept your offer, & have forwarded them by ex. to Bank North America, with draft attached for $15,375. We would further add that we have purchased the bonds from a party strange to us; and not having ever handled any of the Pacific Central, we would sell the bonds without recourse as to their being genuine; consequently, please examine them, and upon being found correct, telegraph immediately (Central all O. K.) We do not doubt the bonds, but coming to us through strange parties, we use this as a precaution, & not willing to take any risk.

"Respectfully yours,

"DONALDSON & FRALEY."

This letter was received by plffs. at New York on Monday, the 29th of May, '71, a short time before the time when the bonds were presented by the messenger of the Bank of North America for delivery to plffs., and prior to defts.' draft for $15,375, which was presented at the same time as the bonds, as hereinafter stated.

5. On the 29th of May, 1871, Monday, the messenger of the Bank of North America, with the bonds, 15 in number, and the draft of defts. for $15,375, appeared at the office of plffs. in New York, to deliver said bonds and collect said draft.

Plaintiffs had, on the said 25th day of May, sold the bonds "to arrive," to Rasmus & Lissignola, bankers and stock-dealers in New York, engaging to deliver them four (4) days thereafter, i. e., on the 29th of May.

When the messenger of the Bank of North America arrived at the office of plffs. with the bonds and draft, it lacked but five or ten minutes of quarter past two p. m., after which hour, by the rules of the
27 New York stock board, deliveries of bonds & stocks sold, could not be made for that day.

Plaintiff Utley, therefore, without examining the bonds, went hurriedly with the bank-messenger to the office of Rasmus & Lissignola, to be in time for delivery that day. Arriving there, with the messenger of the bank, Utley asked Rasmus to examine the bonds, saying he had not had time to do so. Rasmus opened and briefly examined the bonds; said they seem to be correct, and, at the request of Utley, gave the messenger of the Bank of North America Rasmus and Lissignola's check for the amount agreed between them and plffs., $15,403.12, which check was paid.

On the same day, May 29th, 1871, & after the delivery of the bonds as above stated, plffs. wrote and mailed letter to defts., as follows:

"NEW YORK, *May* 29, 1871.

"Messrs. DONALDSON AND FRALEY, *St. Louis;*

"DEAR SIRS: Yours of 25th, and 15 thousand Centrals, with draft recd. The Centrals all correct, and we telegraphed you to that effect.

"Resp'y, yours,

"UTLEY, DOUGHERTY & SCOTT."

7. On the same day, May 29th, 1871, plffs. sent telegraphic dispatch to defts., as follows:

"NEW YORK, *May* 29, '71.

"To DONALDSON & FRALEY:

"Centrals all right.

"UTLEY, DOUGHERTY & SCOTT."

28 8. On receipt of this dispatch by Donaldson & Fraley, on the 29th or 30th of May, they informed Mr. Nichols, cashier of the Commercial Bank, that the bonds were all correct; whereupon Donaldson & Fraley's check for $15,075 was charged up, and Newman & Havens were advised by the Commercial Bank, & remittance made to Newman & Havens.

9. On the 12th of June, 1871, information was for the first time received in New York, or elsewhere, that there were counterfeits of these bonds in existence.

On that day plffs. wrote and mailed a letter to defts., as follows:

"JUNE 12TH, 1871.

"Messrs. DONALDSON & FRALEY, *St. Louis, Mo.;*

"D'R SIRS: Yours of 8th & 9th & *3th*, Leavenworth, from Bank North America, 5th from U. & C. received.

"Look out for counterfeit Central Pacific 6s. Some appeared on market to-day. * * * * * *

"Resp'y, yours,

"UTLEY, DOUGHERTY & SCOTT."

10. On the next day, June 13th, 1871, plffs. sent telegraphic dispatch to defts., as follows:

"NEW YORK, *June 13th*, 1871.

"To DONALDSON & FRALEY:

"Central Pacifics you sold us probably counterfeit. Trace your party. Bonds shipped to Europe; can't hear from them for several days.

"UTLEY, DOUGHERTY & SCOTT."

29 11. On the same day, June 13th, 1871, plffs. wrote to defendants & mailed letter as follows, viz:

"JUNE 13TH, 1871.

"Messrs. DONALDSON & FRALEY,

"*St. Louis, Mo.:*

"DEAR SIRS: Yours of the 10th, &c., * * * * * * * * * We feel uneasy with regard to the genuineness of the Central Pacific 6s you sold us. The bonds have been shipped to Europe, and cannot be heard from for several days. In case your parties are doubtful it would be well to act at once as if the bonds are not genuine. There has been no suspicion that there were counterfeits out until yesterday.

"Resp'y, yours,

"UTLEY, DOUGHERTY & SCOTT."

12. On June 13th defts. sent a telegraphic dispatch to plffs. as follows:

"ST. LOUIS, *June* 13, '71.

"To UTLEY, DOUGHERTY & SCOTT:

"We refer you to our letter May 25th, in which we sold without risk. Have purchased same day from Commercial Bank, and they from Newman & Havens, Leavenworth, without risk. Will aid you all we can if counterfeit.

"DONALDSON & FRALEY."

The bonds in question were sold by Rasmus & Lissignola, immediately after they purchased them, to parties who sent them to Europe, whence they were returned declared to be counterfeit, & returned to Rasmus & Lissignola, who immediately demanded repayment from Utley, Dougherty & Scott, plffs. Whereupon, on July 12th, 30 plffs. sent a telegraphic dispatch to defts., as follows:

"NEW YORK, *July* 12, '71.

"To DONALDSON & FRALEY, *St. Louis:*

"The Central Pacifics bought of you in May are declared counterfeit. We shall look to you for indemnity.

"UTLEY, DOUGHERTY & SCOTT."

13. On the same day, July 12th, '71, plffs. wrote and mailed to defts. a letter, as follows:

"NEW YORK, *July 12th*, '71.

"Messrs. DONALDSON & FRALEY, *St. Louis:*

"GENTLEMEN: We beg to inform you that the Central Pacific bonds we bought from you on 25th May last have been returned from Europe, and are declared counterfeit. On behalf of the parties for whom we purchased the bonds we shall look to you for indemnity. We do not consider that the terms of your letter of 25th May in any way precludes us from our recourse upon you, especially not, in view of the facts disclosed by your telegram to us of June 13th, 1871. We therefore telegraphed you to-day as follows: 'The Central Pacifics we bought of you in May are declared counterfeit. We shall look to you for indemnity.'

"Yours, truly,

"UTLEY, DOUGHERTY & SCOTT."

14. On the 12th of July defts. wrote and mailed to plffs. a letter, as follows:

31 "ST. LOUIS, *July* 12, 1871.

"Messrs. UTLEY, DOUGHERTY & SCOTT,

"*New York City:*

"GENTLEMEN: Your telegram received, in which you state that the Central Pacifics are counterfeit, and that you look to us for indemnity. In my former letter on this subject we referred you to our letter of May 25th & again call your attention to it. Will you have the kindness to write to us in detail on what grounds you propose holding or looking to us for indemnity.

"An early answer will oblige, very resp'y,

"DONALDSON & FRALEY."

On the 3d of August, '71, defts. wrote and mailed to plffs. a letter, as follows:

"ST. LOUIS, *Aug.* 3, '71.

"Messrs. U., D. & S.:

"GENTLEMEN: Mr. Fraley just returned from Madison to-day, hence the delay in answering yours of 25th. We are acting under legal advice & must refuse to make any assignment of claim, as we are not aware yet that we have any.

"Respectfully, yours,

"DONALDSON & FRALEY."

15. On the 8th of August, 1871, plffs. wrote and mailed to defts. a letter, as follows:

"NEW YORK, *August 8th*, 1871.

"Messrs. DONALDSON & FRALEY, *St. Louis, Mo.:*

32 "GENTLEMEN: We have yours of 3d inst., and regret that you do not give us any more satisfactory information. You will allow us to remind you that we paid your draft for $15,375, and received therefore nothing but counterfeit bonds. In answer to our dispatch to you that counterfeit Central Pacifics had appeared in the markets, you sent us a telegram referring us to your note of 25th May & saying at the same time, 'Will aid you all we can if counterfeit.' Setting aside all questions of legal liability, we submit to your sense of fair-dealing, whether you are fulfilling this pledge. You now refuse to make an assignment of any claim you may have against the parties from whom you received the bonds, and assign as the reason for such refusal that you are under legal advice, and do not know whether you have any claim. But we do not ask you to guarantee that you had any claim, and it seems to us that the fact of your being under legal advice is no reason why you should not do everything in your power to help us in recovering the money you have had from us for worthless bonds, but rather a reason why you should help us the more readily. We beg to ask from you a full statement of the precise position you occupied in relation to these bonds; and, if this will aid us in our efforts to make good our loss, you ought to be thankful, & also willing to give us any rights you have against these parties.

"Yours, truly,

"UTLEY, DOUGHERTY & SCOTT."

16. On the 12th of August, 1871, defendants wrote & mailed
33 to plffs. a letter, as follows:

"ST. LOUIS, *August 12th*, 1871.

"Messrs. U., D. & S.:

"GENTLEMEN: In reply to your letter regarding the position we have taken, we can only say that when you consider the circumstances connected with same, we think that you or anybody would act likewise, viz: Some time in May the Commercial Bank called on us & offered the bonds & we made a bid. The cashier then informed us that the inquiry came from Newman & Havens, Leavenworth, & they would telegraph to them the bid we made to the Commercial Bank. In short time answer to Com. Bank from N. & H. that they would accept the bid & had forwarded bonds to Com. Bank. Upon arrival of bonds at the C. Bank, they received a letter from N. & H., stating that they had never dealt in like bonds & they were selling them for strange parties, consequently sell them without recourse. The Com. Bank tendered us the bonds under same condition, and we refused to purchase bonds in the manner presented, but gave the Com. Bank a check under the following conditions, not to charge the check against us until we had been informed by you that the bonds were O. K. We then forwarded the bonds & wrote you precise, that we had not ever handled any of the bonds & we sell them without recourse, & particularly asked you to examine them, & more distinctly said we sell without recourse as to genuineness, as they come from strange parties & use this precaution, not willing to take any risk whatever. Upon receipt of the bonds you telegraphed us 'Centrals all right,' & also wrote by mail confirming your dis-
34 patch, by saying recd. bonds & deft. & found them all correct.

When we received this information we then informed the Com. Bank to charge up check, which they did & at the same time credited Newman & Haven, & we are furthermore informed the parties of whom N. & H. purchased did not call for the money within 10 days after this information of bonds being correct. Now you see plainly that you are all to blame. Had you used the necessary precaution in examining the bonds, specially when your attention was called by us selling without risk, not only would any of us have any trouble or unpleasantness, but would have caught the thieves & brought them to justice. Now please inform us what else could we have done. It shows that we acted prudent' & with care. It is true, you may say, you received the bonds before the letter, but even & more so should you have examined them & informed us. You are aware that N. Y. is the market to detect all irregularities in the bonds spoken of, & you could easily have discovered had you not been careless. Now you plainly see our position. The Com. Bank will not take them back from us unless they are compelled to do so, & why should D. & F. suffer for negligence of yours, when they used all precautions & measures at the time? It is true it is hard for you to part with your money, but not more so than us, whilst we are in no manner to blame. Upon your information confirming the genuineness of the bonds, we parted with the money received for the bonds. Should the Com. Bank, or N. & H., at any time come forward and offer to redeem the bonds, we certainly would be most happy & be much better satisfied than the way it is now.

35 "Regarding our writing that we would aid you all we could, did not infer that if you made a demand upon us for the money that we would pay same, but meant that if it was in our power to make parties originally selling them replace them, we would do so; & we are more so willing now than ever; but we cannot concede nor agree to give you any claim against the Commercial Bank, whether we have legal right or not. It would certainly be admitting, on our part, that if we assign claim against Com. Bank, that you certainly have likewise claim against D. & F., & also right to assign, which we really cannot admit, as we positively do not believe so. We are ready at any time to testify to the facts as they are & were, & should the law declare us wrong, we feel confident that N. & H. & Com. Bank will abide by same; but under no circumstances will they refund without action, as they firmly believe as we do, that your claim is not just under the circumstances.

"If you were right in your demands, tell us, in the name of the law, justice, or common custom, would we or any dealer receive from any stranger or honest party known to us but not responsible, any securities to be sold on arrival in N. Y., & the funds to be credited upon sale & delivery in N. Y., & especially if sold under the conditions we sold bonds to you? How would you have proceeded in this or any case? The sum total is, you have made a mistake, & we are ready to assist you all we can to defend your claim, if you have any. We now refer you to our last letter, in which we informed you that we would rather you
36 would begin action immediately, in order to have things settled & the suspense removed. What we have written we will enter as evidence, & has been written with consent of Com. Bank, as they are fair & honorable.

"Trusting you now plainly see our position, and we feel sanguine that were you placed in our position you certainly would not have acted differently,

"Yours, friendly,

"DONALDSON & FRALEY."

17. Utley (plff.) subsequently, in Sept., 1871, stated to defts., when asked, in view of defts.' letter of May 25th, 1871, which he admitted having received, why he did not examine the bonds with care before paying for them, that he received similar letters from the country every day, and that he supposed defts. were cautious only because they had not handled any of these bonds before.

18. The money paid by Donaldson & Fraley by their check to the Commercial Bank, and by it to Newman & Haven, was not, according to the statement of Newman & Haven to Nichols, cashier, called for, nor paid by Newman & Haven at Leavenworth, Kansas, to the party who sold the bonds to Newman & Haven, for two or three weeks after it was received by Newman & Haven from the Commercial Bank.

19. Before writing the letter of May 25th, 1871, hereinbefore set out, and transmitting the bonds to New York, the defendants, who had never seen any Central Pacific bonds, took said bonds, or some of them, to two banking establishments in the city of St. Louis, and asked one
37 the officials of each of said banks whether they knew about them, but was informed that they did not, as those bonds were not known or dealt in in this market.

20. Both the plaintiffs and defendants were brokers and stock-dealers, the former in N. Y. & the latter in St. Louis, & were business correspondents of each other.

The court further finds—

21. That the bonds sold by defts. to plffs. were spurious.

22. That the identical bonds sold by defts. to plffs. have been produced upon the trial by the plffs., to be surrendered if they shall recover.

23. That the defendants, when they sold and delivered the bonds to plaintiffs, did not know or believe that the bonds were forged or spurious, & they did not know this until informed thereof by the plaintiffs on June 12, 1871, as hereinbefore stated; and their only knowledge of the bonds prior to the sale and delivery thereof appears from the facts hereinbefore set forth.

Upon the foregoing facts the court finds, as a conclusion of law, that the defendants are entitled to judgment, to which finding & conclusion of law the plaintiffs then & there excepted.

The court filed with its findings of law & facts the following opinion, as the ground of its judgment for the defendants:

38 OPINION OF THE COURT.

Grounds for conclusions & findings of law.

DILLON, circuit judge; TREAT, J., concurring.

From the foregoing facts the court is of opinion that the contract by telegrams was to sell and deliver genuine bonds, the delivery to be in futuro, & payments to be made upon delivery. The tender of delivery was accompanied with the express condition set forth in the letter from the defendants to the plaintiffs of date May 25th, 1871, to the effect that the bonds as to genuineness should, if accepted, be at the sole risk of the plaintiffs, and giving the latter opportunity for examination of the bonds before accepting them, stating the reasons why the defendants would not deliver the bonds except on the terms that the plffs. should assume the risk of their being genuine. This letter was received by the plaintiffs before the bonds were tendered to them, & they paid for the bonds & telegraphed the defendants that they were all right.

Before the contract made by the telegrams was executed by the de-

livery of the bonds, the defendants said, in substance, to the plaintiffs: "We will not deliver the bonds except at your risk as to genuineness. You may examine & satisfy yourselves on this point, but we will not make any other kind of delivery." The plaintiffs would have had the right to refuse to accede to any such modification of the contract made by the telegraphic dispatches, & to have refused to accept the delivery on the terms proposed in the letter of May 25th, & to have held the defendants for damages for the non-delivery in compliance with the contract. But by not refusing to receive the bonds upon the condi-
39 tions named in this letter, & by acting upon that letter, & by assuring the defendants, in response to it, that the bonds were all right, in consequence of which the latter paid their vendor for the bonds, the plaintiffs must, in law, be taken to have assented to the modification of the contract of sale made by the telegrams, & to have accepted the bonds in performance of it, or the plaintiffs are estopped to insist that the letter of May 25 does not affect the transaction or the rights of the parties to the contract, and this although there was no distinct consideration for the modification.

The loss in the transaction has arisen from the want of due precaution or diligence on the plaintiffs' part, after receiving the letter, to ascertain whether the bonds were genuine, and as no fraud was practiced by the defendants the loss must fall upon the plaintiffs, & this on the familiar principle that where a loss must fall upon one of two innocent persons it must be borne by him whose conduct occasioned it.

In the absence of a contract to the contrary, it is undoubtedly true that there is an implied warranty of the genuineness and legal validity of bonds, notes, or choses in action sold by a private person or public broker. (Jones vs. Ryde, 5 Taunt., 438; Westropp vs. Solomon, 8 C. B., [Man G. & S.,] 345; Gompertz vs. Bartlett, 2 El. & Bl., 849; Watson vs. Chesire, 18 Iowa, 203, & cases cited; Young vs. Cole, 3 Bing. N. C., 724; Lambert vs. Heath, 15 Meeson & W., 486; Menn vs. Nickalls, 7 L. R. Ch. App., 733; Flynn vs. Allen, 57 Pa. St., 482; Rieman vs. Fisher, 4 Am. Law Reg., [O. S.,] 433.)

But in this case the plaintiffs assumed the risk of genuine-
40 ness. This is its distinguishing character. Such an assumption or contract is not void because it is against public policy.

And in our judgment it cannot be deduced from the facts that it was void because of fraud, express or implied.

To which the plaintiffs also then and there excepted. Judgment was thereupon entered for the defendants, as follows:

(Copied on page 21 of this transcript.)

To which the plaintiff then and there excepted, & the foregoing is hereby signed by the judge presiding at the trial as & for a bill of exceptions.

JOHN F. DILLON,
Circuit Judge.

And afterward, at said March term, A. D. 1874, of said circuit court, the following further proceedings were had in this cause on Friday, the 10th day of April, A. D. 1874, to wit:

WILLIAM R. UTLEY ET AL., PLAINTIFFS,
vs.
JOHN W. DONALDSON ET AL., DEFENDANTS. } Petition.

This day come the plaintiffs, by their attorney, and present to the court a writ of error to reverse the judgment herein; also, a citation ad-

monishing the defendants to appear at the next term of the Supreme Court of the United States. Whereupon said writ of error is allowed, and the citation signed by the honorable John F. Dillon, circuit judge, who presided at the trial.

41 And afterwards, at said March term, A. D. 1874, of said circuit court, the following further proceedings were had in this cause on Saturday, the 25th day of April, A. D. 1874:

WILLIAM R. UTLEY ET AL., PLAINTIFFS,
vs.
JOHN W. DONALDSON ET AL., DEFENDANTS. } Petition.

This day come the plaintiffs, by their attorney, and present their bond of appeal in this case, duly executed as required by law, which is approved and ordered to be filed and made a part of the record herein.

The bond filed as aforesaid is in the words & figures following, to wit:

Bond.

Know all men by these presents that we, Spencer Scott, as principal, and William R. Hughes, as surety, are held and firmly bound unto John W. Donaldson and Moses Fraley, in the full and just sum of five hundred dollars, to be paid to the said John W. Donaldson & Moses Fraley, heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this twenty-fifth day of April, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas lately, at the March term, A. D. 1874, of the circuit court of the United States for the eastern district of Missouri, in suit depending in said court between William R. Utley, George W. Dougherty, and Albert L. Scott, plaintiffs, and John W. Donaldson and Moses Fraley, defendants, judgment was rendered against the said plaintiffs; and

42 the said plaintiffs having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendants citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that, if the said William R. Utley, George W. Dougherty, and Albert L. Scott shall prosecute said writ to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

SPENCER SCOTT. [SEAL.]
WM. R. HUGHES. [SEAL.]

Approved by—

SAMUEL TREAT, *Judge.*

43 UNITED STATES OF AMERICA,
Circuit Court for the Eastern District of Missouri, ss:

I, Austin Drake, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto annexed to be a transcript of the record and proceedings in case of

William R. Utley et al. against John W. Donaldson et al., as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this eighteenth day of June, in the year of our Lord eighteen hundred and seventy-four.

[SEAL.]

AUSTIN DRAKE, *Clerk*,
By H. C. GEISBERG, *Deputy*.

(Indorsed:) United States circuit court, eastern district of Missouri Wm. R. Utley et al. against John W. Donaldson et al. Duly certified transcript of the record and proceedings in the above-entitled cause.

(Indorsement on cover:) No. 151. William R. Utley, George W. Dougherty, & Albert L. Scott, plaintiffs in error, vs. John W. Donaldson and Moses Fraley. E. Missouri, C. C. U. S. Filed 15 October, 1874.

REC. 151—3

Supreme Court

OF THE UNITED STATES.

William R. Utley, George W. Dougherty and Albert L. Scott,

Plaintiffs in Error,

vs.

John W Donaldson and Moses Fraley,

Defendants in Error.

Brief on Behalf of Plaintiffs in Error.

CHAS. M. DA COSTA,

Of Counsel for Plaintiffs in Error.

New York:

DAVIS & CORSON, PRINTERS, 39 NASSAU STREET.

Express Company of the books and draft, but on

Supreme Court of the United States.

WILLIAM R. UTLEY, GEORGE W. DOUGHERTY and ALBERT L. SCOTT,
Plaintiffs in Error,

v.

JOHN W. DONALDSON and MOSES FRALEY,
Defendants in Error.

Brief on behalf of Plaintiffs in Error.

Statement.

During the year 1871, the plaintiffs in error were bankers and brokers in the city of New York, under the firm name of Utley, Dougherty & Scott. The defendants in error were engaged in like business in the city of St. Louis, under the firm name of Donaldson & Fraley.

On the 25th of May, 1871, the defendants in error sold to the plaintiffs in error fifteen Central Pacific bonds of $1,000 each, with the coupons thereto attached, at 102½, *i. e.*, for the sum of $15,375. The contract was made by telegraph, (finding 3, page 16 of record). The bonds were, on the 25th of May, forwarded by the ~~defendants~~, by express, to the Bank of North America, New York, accompanied by a draft for the sum of $15,375, the agreed price, the bonds to be delivered to the plaintiffs, on the payment of the draft (finding 4, page 17 of record). After the making of the contract and after the delivery to the express company of the bonds and draft, but on

the same day, to wit, on the 25th of May, 1871, the defendants in error mailed the following letter to the plaintiffs in error, (page 17 of record).

"ST. LOUIS, May 25, 1871.

"MESSRS. UTLEY, DOUGHERTY & SCOTT:

"*Gentlemen:*—In accordance with your offer for 15 Central Pac. 1st Mort. Bonds, 102½, we replied, we accept your offer, and have forwarded them by ex. to Bank of North America, with draft attached for $15,375. We would further add that we have purchased the bonds from a party strange to us; and not having ever handled any of the Pacific Central, we would sell the bonds without recourse as to their being genuine; consequently, please examine them, and upon being found correct, telegraph immediately (Central all O. K.) We do not doubt the bonds, but coming to us through strange parties, we use this as a precaution, and not willing to take any risk.

"Respectfully yours,

"DONALDSON & FRALEY."

This letter was received by the plaintiffs in error at New York, on Monday, the 29th of May, 1871, a short time before the draft, accompanied by the bonds, was presented by the messenger of the Bank of North America to the plaintiffs in error for payment, (finding 4, page 17 of record).

The messenger of such bank demanded payment of said draft, and tendered the bonds to the plaintiffs in error about five or ten minutes after two o'clock P. M. of that day, (finding 5, page 17 of record.

On the 25th day of May, 1871, the plaintiffs in error sold the bonds, so purchased by them, to the firm of Rasmus & Lissignola, stock brokers and bankers in the city of New York, "to arrive," engaging to deliver them four days thereafter, *i. e.*, on the 29th of May. By the rules of the New York Stock Exchange, of which both Rasmus & Lissig-

nola and the plaintiffs in error were members, delivery of bonds and stocks sold cannot be made on any given day after a quarter past two o'clock P. M. (*Ibid.*)

When the bonds were tendered to the plaintiffs in error, and the draft presented for payment, it lacking but about five minutes of the time of a quarter past two of the day on which the plaintiffs in error had in their turn agreed to deliver the bonds in question to Rasmus & Lissignola, they had no time to examine them, but were obliged to go hurriedly with the bank messenger to the office of Rasmus & Lissignola, to be in time for delivery on that day. Arriving there with the messenger of the bank, one of the plaintiffs in error asked Mr. Rasmus to examine the bonds, saying he had no time to do so. Mr. Rasmus opened and examined the bonds, said they seemed to be correct, and, at the request of one of the plaintiffs in error, gave the messenger of the Bank of North America his firm's check for the amount they had agreed to pay, viz. $15,403 $\frac{12}{100}$, and which check was paid. (*Ibid.*)

Thereafter, and on the same day the plaintiffs in error wrote to the defendants in error as follows: (*Ibid.*)

"NEW YORK, May 29th, 1871.

"MESSRS. DONALDSON & FRALEY, *St. Louis:*

"*Dear Sirs:* Yours of 25th, and 15 thousand Centrals, with draft recd. The Centrals all correct, and we telegraphed you to that effect.

"Resp'y, yours,

"UTLEY, DOUGHERTY & SCOTT."

The telegram referred to in said letter, being in these words: "Centrals all right," (finding 7, page 18 of record).

On the receipt of that telegram on the 30th of May, the defendants in error, who, it appeared, had purchased the bonds only conditionally, and not from a stranger, but from their own bank in St.

Louis, viz., the Commercial Bank, (finding 12, page 18, and finding 2, p. 16 of record), the statements contained in their letter of the 25th of May, 1871, to the contrary, notwithstanding, paid to the Commercial Bank their check for $15,075, that being the amount they had agreed to purchase them for. The Commercial Bank in its turn, remitted the amount to Newman & Havens, for whom the Commercial Bank were acting, and they in their turn kept the money for two or three weeks thereafter, before they paid it to the person from whom they had bought the bonds, an alleged stranger to them, (findings 8 and 18, pages 18 and 22 of record).

It was not until the 12th day of June, 1871, that information was received for the first time in New York, or elsewhere, that there were counterfeits of these bonds in existence (finding 9, page 18 of record). Immediately on such fact being known in the New York market, the plaintiffs in error telegraphed to the defendants in error as a piece of news (finding 9, page 18 of record):

"Look out for counterfeit Central Pacific 6s. Some appeared on market to-day."

And on the following day telegraphed as follows (finding 10, page 18 of record):

"Central Pacifics you sold us probably counterfeit. Trace your party. Bonds shipped to Europe; can't hear from them for several days."

And on the same day they wrote as follows (finding 11, page 18 of record):

"JUNE 13, 1871.

"Messrs. DONALDSON & FRALEY,

ST. LOUIS, MO.:

"*Dear Sirs:* Yours of the 10th, &c., * * * * We feel uneasy with regard to the genuineness of the Central Pacific 6s you sold us. The bonds have been shipped to Europe, and cannot be heard from for several days. In case your parties are doubtful, it would be well to act at once as if the bonds are

not genuine. There has been no suspicion that there were counterfeits out, until yesterday.

"Resp'y, yours,

"UTLEY, DOUGHERTY & SCOTT."

On the same day, and in answer to the plaintiffs' telegram of the same day, the defendants in error telegraphed (finding 12, page 18 of record):

"ST. LOUIS, June 13, '71.

"To UTLEY, DOUGHERTY & SCOTT:

"We refer you to our letter May 25th in which we sold without risk. Have purchased same day from Commercial Bank, and they from Newman & Havens, Leavenworth, without risk. Will aid you all we can, if counterfeit.

"DONALDSON & FRALEY."

The bonds turned out to be counterfeits. Reclamation was made by the plaintiffs in error on the defendants in error, which was refused. Thereupon the plaintiffs in error brought their action in the Circuit Court of the District of Missouri against the defendants in error; and in their amended petition (page 9 of record) aver in substance the purchase by them of fifteen Central Pacific one thousand dollar bonds, from the defendants in error, for the agreed price of $15,375; the payment of said price; the delivery by the defendants, instead of fifteen valid bonds, fifteen papers purporting to be bonds, which subsequently turned out to be counterfeit bonds; the total failure of the consideration for the payment of said sum of $15,375; and the refusal of the defendants to repay the same.

The defendants in their answer to the amended petition (page 11 of record) admit the making of the contract to deliver fifteen Central Pacific bonds, but aver that the agreement was subsequently modified so that the plaintiffs in error agreed to receive in satisfaction of the contract *the* specific fifteen bonds so tendered them without recourse upon them for their genuineness.

There was a replication (page 12 of record) denying in substance the defence set up.

The case was tried before the Court without a jury, a jury having been waived; and, thereupon, the Court made certain special findings of fact (pages 15 to 22 of record), and on such findings of fact found as a conclusion of law, "that the defendants are entitled to judgment," (page 22 of record). Exception was duly made to such conclusion, (*ibid*) and a bill of exceptions duly tendered and signed (page 23 of record).

Judgment having been entered in favor of the defendants (page 15 of printed record), the plaintiffs sued out their writ of error to this Court.

The Court below delivered an opinion, which will be found at pages 22 and 23 of the record.

Assignment of Errors.

The plaintiffs in error assign as error, in that the Court below on the special findings of fact directed a judgment in favor of the defendants in error, when by law it ought to have directed a judgment in favor of the plaintiffs in error for $15,375, with interest from May 29th, 1871, the amount demanded in their amended petition, because

(*a.*) The contract between the parties was effected and concluded by their telegraphic correspondence held on May 25th, 1871, and by such contract the defendants in error impliedly warranted the genuineness of the bond sold and to be delivered under such contract.

(*b.*) The letter of May 25th, 1871, written by the defendants in error to the plaintiffs in error, after the making of the contract, and received by them on the 29th May, and the acts and doings of the plaintiffs in error on its receipt, neither released the defendants in error from such warranty nor amounted to a modification in that respect of the contract as originally entered into.

(*c.*) Even if such letter and acts and doings produced in law such effect, yet the plaintiffs in error were still entitled to recover the amount paid on the draft drawn by the defendants in error on them, by reason of a total failure of consideration.

Point I.

The judgment of the court below must be sustained, if at all, on the special findings of fact. No inference or presumption can be drawn or indulged in by this Court to support the judgment below. If the judgment is not warranted by the facts contained in the special finding, the judgment below must be reversed.

Prentiss *v.* Zane, 8 How., 470, 484.
Graham *v.* Bayne, 18 How., 60, 63.

Point II.

The Court below concedes in its opinion (pages 22 & 23) that the contract for the sale and purchase of the bonds was made by the telegraphic correspondence on the 25th day of May, 1871; and that under the contract so made the law would imply a warranty that the bonds so sold were genuine Central Pacific bonds. The authorities in support of that latter proposition are collated in the opinion of the Court, to which others might be added, were it not deemed that the law on that subject is so well settled as to hardly need the citation of any authorites. It also concedes that the plaintiffs in error could have refused to receive the bonds tendered after the receipt of the letter of May 25th, 1871, and

could have held the defendants in error for damages for the breach of the contract so entered into.

To that concession will have to be added the further one that the plaintiffs in error had the right to sue the defendants in error for the damages sustained by reason of the breach of warranty, even though they kept the bonds and did not offer to return them. For where there is a warranty of a personal chattel, the law does not impose on the buyer the duty to return it if the warranty is untrue, but he is allowed to keep the chattel and recoup or sue for the breach of warranty.

Day *v.* Pool, 52 N. Y., 416.
Parks *v.* Morris Axe Co., 54 N. Y., 586.
Milton *v.* Rowland, 11 Ala., 732.
Plant *v.* Condit, 22 Ark., 254.
Mears *v.* Nichols, 41 Ill., 207.
Carter *v.* Stinnet, 10 B. Mon. (Ky.), 250.
Cook *v.* Grey, 2 Bush. (Ky.), 121.
Thompson V. Botts, 8 Mo., 710.
Ross *v.* Barker, 30 Id., 385.
Bourman *v.* Jenkins, 12 Wend. N. Y., 566.
Cozzens *v.* Whitaker, 3 Stew. & P., (Ala.), 322.
Waring *v.* Mason, 18 Wend. N. Y., 425.
Bonekins *v.* Bevan, 3 Rawle, 322.
Parker *v.* Pringle, 2 Strobh. (S. C.), 242.
Houghton *v.* Carpenter, 40 Vt., 588.
Fisk *v.* Tank, 12 Wis., 276.
Terry *v.* Allis, 16 Wis., 478.

But the Court below held, that the letter of the defendants in error to the plaintiffs in error, dated May 25, 1871, written after the making of the contract by telegraph, and not received by the plaintiffs in error until a short time prior to the actual tender of the bonds and the draft for payment, when coupled with the acts of the parties, modified the contract, and that "the plaintiffs must in law be "taken to have assented to the modification of the "contract of sale made by the telegrams, and to have "accepted the bonds in performance of it, *or* the "plaintiffs are estopped to insist that the letter of "May 25th does not affect the transaction or the "rights of the parties to the contract; and this

"although there was no distinct consideration for "the modification."

It will be noticed that the Court below is not exactly certain on which of the two grounds to put its decision. Neither, nor their conclusion, is, it is respectfully submitted, sustainable.

Point III.

The receipt by the plaintiffs in error of the letter dated May 25, 1871, hereinbefore specifically set out, when coupled with the acts of the parties, as detailed in the findings, neither released the defendants in error from the warranty of genuineness implied in the contract previously entered into, nor modified in that respect such contract.

1. In construing the letter it is well to recall *in limine* the well known rule of law that, if it be left in doubt, in view of the general tenor of the instrument, and the relations of the contracting parties, whether given words were used in an enlarged or restricted sense, that construction should be adopted which is most beneficial to the promisee.

Hoffman *v.* Ætna Ins. Co., 32 N. Y., 405, 413, and authorities there referred to.

Now the language of the letter referred to and its context, is divisible into two parts—the first part, viz., the first sentence, "In accordance with your offer for 15 Central Pac. First Mort. Bonds, 102½, we replied we accept your offer and have forwarded them by Ex. to Bank of North America, with draft attached for $15,375," was the absolute reiteration by the defendants in error of the original contract, coupled with a notification that a draft, for the price agreed upon for the bonds, had been drawn and forwarded for collection.

The draft so drawn was presented, and in lieu of its being attached to genuine bonds bought and sold by the contract made by telegraph on the 25th of May, 1871, was attached to and accompanied by bonds, which afterwards turned out to be spurious and counterfeit.

The second part consists of the remaining portion of the letter, viz.: "We would further add that we have purchased the bonds from a party strange to us," [a statement the falsity of which the special findings of fact demonstrate] "and not having ever *handled* any of the Pacific Centrals, *we would* sell the bonds without recourse as to their being genuine. Consequently, please *examine* them, and upon *being found correct* telegraph immediately (Central all O. K.). We do not doubt the bonds, but coming to us through strange parties we *use this as a precaution and not willing to take any risk.*"

It will be noticed that this letter is not one which definitely says, as the Court below seemed to construe it, "You have got to accept these specific bonds, so tendered you, in fulfillment of our contract, and if you do not, we decline to fulfill our contract. If you do, and pay us $15,375, you can never recover that amount from us, even though the bonds so tendered be spurious." No such construction can fairly be put on the letter. The bonds purchased under the contract were not *the* specific bonds tendered. They were not bonds of any given number, but fifteen genuine Central Pacific bonds. Hence, from the contract re-stated in the first sentence of such letter, there was no release. At best, it was but a modification or release of the implied warranty as to the specific fifteen bonds tendered. It was not a release from the warranty of the genuineness of the bonds purchased under the contract, and for which the draft was paid. The more especially must such be its interpretation, for otherwise the plaintiffs in error would, without any consideration, agree to become,

as against themselves, the absolute judges of the genuineness of securities not issued by them, and counterfeits of which were not then even suspected to be in the market. The expression "*to examine*" the bonds, under the circumstances of the case, means precisely what the plaintiffs in error did. They (or rather, for want of time, Mr. Rasmus, like themselves a stock broker, in New York) examined them and said they seemed correct. The defendants in error, by their expression that they had "*not handled*" Central Pacific bonds, gave a virtual interpretation to the word "*examine.*" Even though they had previously "*handled*" such bonds, of which there was no suspicion of counterfeits, they themselves could not have determined absolutely their genuineness, as they were neither the makers nor the agents of the makers,

The reasonable construction, therefore, of the letter is simply this: "We have agreed to sell you fifteen Central Pacific bonds for $15,375. We have drawn on you for that amount, and the bonds are attached. We have, however, never dealt in that class of securities, and therefore we do not know even their appearance, whether printed on green, brown or red paper. You do. Will you not please look at them and see whether, so far as you can judge, they are what they purport to be. If yes, telegraph us, as we have bought from a stranger, and do not wish to assume any risk." In other words a mere request for an expression of an opinion. With such request the plaintiffs in error complied; their best judgment was given; and for error therein the loss should not be visited on them.

In *Westropp* vs. *Solomon*, (8 *M. G. & S.*, 345), a case to be hereafter further alluded to, it appeared that the defendant, before purchasing, took one of the instruments to the plaintiffs' office, and inquired of one of the plaintiffs if the instrument was good, the plaintiff being a stock broker and the instruments being shares. The plaintiff said "it was good," or, "it is all right," or, as other witnesses

used the words, "Well, it is all right." Thereupon the defendant instructed the plaintiff to sell these shares in the market. The plaintiff sold them, and on their being discovered forgeries was, under the rules of the London Stock Exchange, obliged himself to make the purchase good, and thereupon brought his action against the defendant to recover back the money from him. Among other things it was contended that the plaintiffs could not recover by reason of such statement. The Court, however, per Maule, J. (page 368), said :

"But whatever was meant, I do not think that material, for I do not think our decision of the case ought to be at all influenced by what took place on that occasion. Both parties were innocent of any intention to deceive or mislead. *The mere expression of an opinion bona fide given at the defendant's request, certainly does not amount to a warranty of the genuineness of the scrip*, OR IMPOSE ANY LIABILITY ON THE PERSON GIVING IT."

Can it be fairly maintained that the plaintiffs in error understood such letter to mean that they were to judge of the genuineness of the bonds, and if their judgment was erroneous and they paid $15,375 for waste paper, then they could not recover it of the defendants in error. If not, the construction given by the Court below is erroneous. For a waiver of a stipulation in an agreement must, to be effectual, be made intentionally, and with knowledge of the circumstances. Thus, where a written agreement exists, and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for the written agreement, he must clearly show, not merely his own understanding as to the new terms of the agreement, but that the other party had the same understanding.

Darnley *v.* London, Chatham and Dover R. R. Co. (Law Rep., 2 H. of L., 43).

In *Murray* v. *Harway* (56 N. Y., 337), the Court

held that the negotiations for the variation of an agreement will not amount to a waiver of it, unless circumstances show the intention of the parties that there should be an absolute abandonment and dissolution of the contract.

The telegram and letter of the plaintiffs in error to the defendants in error, on June 13th, 1871, (10th and 11th findings of fact, page 18 of record), show that the plaintiffs in error did not so understand the alleged modification. For on that day they both telegraphed and wrote to the defendants in error that the bonds they had sold them were probably counterfeit, and "in case your parties are doubtful, it would be well to act at once as if the bonds were not genuine. There has been no suspicion that there were counterfeits out until yesterday."

An *aggregatio mentium* is an inherent ingredient of a contract; so, too, of a modification.

2. Again, it was not within the power of the defendants in error to annex, on the fulfillment of the contract, terms not contained in the original contract, by means of the letter above described, or, in fact, by any means whatever.

In *Schuchardt* v. *Allens*, (1 *Wallace*, 359), a contract for the sale of merchandise was completed by delivery, and at the same time the seller delivered to the purchaser a bill or memorandum of sale stating that "no claims for deficiencies or imperfections allowed unless made within *seven days* from receipt of goods." The purchaser did not return the goods, and finding about *three weeks after receipt*, that there were imperfections in the merchandise, sued on the warranty of quality. The defence, *inter alia*, was the foregoing memorandum set out on the bill rendered with the goods. But this Court held that the memorandum contained in the bill of sale nowise affected the transaction, saying (page 369), "The contract between the parties thus became complete, and nothing done subsequently by the defendant or their agents could affect the rights of the plaintiffs."

In *Josling* v. *Kingsford*, (7 *Law Times, N. S.*, page 790), the contract as made by the broker's note was for oxalic acid, to be of an approved quality. It appeared that the defendant had written a letter to the plaintiffs in which he used the expression, "As regards the strength of the oxalic, your friend having already examined the bulk, *we decline all responsibility in this respect, and to avoid any unpleasant differences. You are, however, quite welcome to examine it again if you think proper.*" The oxalic acid delivered did not come up to the quality. It was contended on the part of the defendant, that inasmuch as he had disclaimed all responsibility as to the quality of the article, and that the plaintiff had himself inspected it in order to form his own judgment as to the nature and quality, the description of it in the bought and sold note, as oxalic acid, formed no part of the contract between the parties. The Court, however, was of the contrary opinion, saying that "however completely the defendant may have guarded himself against contracting that the thing was of any particular quality, it is not possible to construe the contract in any other way than that it was part of the agreement that the material should be oxalic acid of commerce; and that therefore the defendant is liable."

3. Again, it is now well settled, that if the original contract be required to be in writing, under the terms of the Statue of Frauds, (as the contract in question was) any modification must likewise be in writing, and conform to requirements of the Statute.

Swain *v.* Seamens, 9 Wal., 254, 271 & 272.
Shultz *v.* Bradley, 57 N. Y., 646.
Noble *v.* Ward, Law Rep., 1 Exch., 117; affirmed Law Rep., 2 Exch., 135.

Now, the alleged modification of the contract does not conform to the requirements of the Statute of Frauds, if for no other reason than that the price to be paid for bonds not genuine, or subject to the risk of their being not genuine, is not therein specified; the

price in the first sentence of the letter, having exclusive reference to the bonds agreed upon to be purchased, under the contract of May 25th, 1871, to wit, genuine bonds. The rule, apparently first enunciated in *Wain* v. *Warlters*, (5 *East.* 10,) was stated by the Court of Appeals of the State of New York, in *Wright* v. *Weeks*, (25 N. Y. 153-161), as follows:

"Our statute in terms requires the consideration to be expressed. If the consideration and promise cannot both be ascertained with precision in the writing, the agreement will not satisfy the requisition of the Statute."

See also the authorities there cited.
Also Bailey *v.* Ogden, 3 Johnson, 399.
Browne on Statute of Frauds, §§ 371 and 376.

The necessary result from this is, that nothing but the original contract of sale was legally in existence, and the Court cannot imply, as a modification thereof, a contract not valid, because invalid under the Statute of Frauds.

4. The alleged waiver or modification of the contract was without consideration. It, therefore, could not be enforced.

If, as has been held, a consideration be required for a subsequent warranty (*Summers v. Vaughan*, 5 *Indiana*, 323; *Towell v. Gatewood*, 3 *Ill.*, 22,) the reverse of the rule must necessarily be true, *i. e.*, that a modification by which a warranty is released must be based on some consideration.

5. The words "selling without recourse," used in the letter, are derived from the law of negotiable paper.

A seller of a note or other negotiable instrument sold without recourse, or without endorsement, does not thereby release himself from the implied warranty of the genuineness of the instrument sold.

Daniel on Negotiable Instruments, § 670.
Gompertz *v.* Bartlett, 2 Ellis & Blackburn, 849.
Gurney *v.* Womersley, 4 Ellis & Blackburn, 133.
Herrick *v.* Whitney, 15 Johnson, 240.
Shaver *v.* Ehle, 16 Johnson, 201.
Bell *v.* Cafferty, 21 Ind., 411.
Merriam *v.* Wolcott, 3 Allen, 258.
Dumont *v.* Williamson, 18 Ohio State, 515.
Aldrich *v.* Jackson, 5 R. I., 218.

6. And on the sale of personal property, other than notes and securities, similar doctrine applies.

For in case of such sale, *even without warranty and with negative stipulation as to responsibility*, the law still implies that the thing sold shall exist and answer the description.

Thus, in *Shepherd* v. *Kain*, (5 *Barn. & Ald.*, 240,) the advertisement for the sale of a ship described her as a "copper fastened vessel," adding, however, that the vessel was to be taken "*with all faults and without any allowance for any defects whatever.*" It appeared that she was only partially copper fastened. The Court held that, notwithstanding the words "with all faults, and without allowance for any defects whatever," the vendor was liable for the breach of the warranty; saying, "'*with all faults*' *must mean with all faults which it may have consistently with its being the thing described.*" See also the case of *Josling* v. *Kingsford*, (7 *Law T., N. S.*, 790,) where, although the party disclaimed all responsibility as to the quality of the oxalic acid, yet the Court held that the thing delivered must be oxalic acid.

In *Nichol* v. *Godts*, (10 *Exch.*, 191,) the sale was by sample, and was warranted equal to sample, but likewise described the property sold as "Foreign refined rape oil." The Court held that, although the goods tendered might be equal to sample, yet the goods tendered must be "Foreign refined rape oil."

In *Lanata* v. *O'Brien* (13 *La. Ann*, 229), there was a sale of a number of barrels of potatoes and onions at a given price, to be delivered from

a vessel then in transit. There was no warranty of any kind, except as to the number of barrels. The Court held that the exclusion of a warranty did not empower a vendor to deliver barrels partly empty, or containing decayed matter; in other words, that, although there was no warranty of quality or kind, the kind delivered must be of the nature of the thing sold, and not a nullity.

7. Even if the latter portion of the letter be deemed to be a modification of the prior contract, yet its reasonable interpretation, is, that, under the circumstances of the case, the plaintiffs in error were bound "*to examine*" the bonds and give their fair judgment. They were not the makers of the bonds, nor the agents for the makers, nor in any manner legally connected with them. They could but judge of their general appearance. There was no suspicion at that time that there were any fraudulent bonds in the market, and the moment such suspicion did exist, the defendants in error were notified. At best, the plaintiffs in error have been negligent, and negligence in not ascertaining the genuineness of an instrument, *when they were not charged by law with the duty of knowing it*, does not prevent their recovering back the money paid under a mistake of facts.

National Bank of Commerce of New York *v.* N. M. Banking Ass'n of New York, 55 N. Y., 215.
Bank of Troy *v.* Bank of New York, 43 N. Y., 455.

It must be remembered, too, that the plaintiffs in error had no right to make other than a cursory examination. The bonds were presented by a clerk of the Bank of North America, with a sight draft thereto attached, shortly before the closing of banking hours. They had no right to take such bonds from the possession of the bank and make inquiries which would absolutely demonstrate their genuineness; nor had they the right to compel the messenger of the bank to accompany them all over the city in order to ascertain, if possible, their genuineness.

In the case of *Turner* v. *Tuttle*, (1 *Root*, 350) the Court remarked on this subject:

"The value of public securities is considered as a matter of public notoriety equally in the knowledge of the buyer as of the seller. But the genuineness of them is not so. *Nor could it be found out in this case without much time, pains and cost. The seller in such cases takes the risk upon himself and is responsible.*

So, too, at best it was a latent defect. And in cases of latent defect a vendee with warranty is not bound to apply tests to ascertain defects not open and visible. If afterwards discovered, he has his remedy for the breach.

Dounce *v.* Dow, 57 N. Y., 16.

Again, the receipt of public securities is always subject to a right, within a reasonable time thereafter, to examine them and ascertain their genuineness. Such reasonable time was not afforded, for the draft was a sight draft and had to be paid on presentation.

The recent case of *Cooke et al.* v. *The United States*, (91 U. S. R., 389), is instructive in this respect. There the Sub-Treasury at New York had bought forged 7-30 notes. And even in that case, where the maker, to wit, the United States, had bought its own forged notes, this Court held that they had a reasonable time thereafter to ascertain their genuineness, and, if found forged, to recover from the person, from whom they had bought them, the money they had paid therefor. The Court said, (page 402), "neither has there been such delay in returning the notes to Cooke & Co., after their receipt by the Assistant Treasurer, as will throw the burden of loss upon the Government. The return should have been made within a reasonable time, and what is a reasonable time is always a question for the court when the facts are not disputed. *Wiggins* v. *Burkham*, (10 *Wallace*, 133.) Here there is no dispute. The notes were delivered to the Assistant Treasurer on different days, between September 20th and October 8th. The first

suspicion in Washington in regard to their character was on October 5th, when a note was found, of which upon inspection of the record, a duplicate was already in. All the notes were found and returned to New York, October 12th, and the next day Cooke & Co. were notified. * * * Time must be given for careful examination and scrutiny, and we do not think that under all the circumstances any unreasonable delay occurred, either in their transmission to or return from the Treasury Department."

In the case at bar the first suspicion of counterfeit bonds in the market arose on June 12, 1871. The news was instantly telegraphed to defendants in error, and on the following day the defendants in error were again telegraphed to, advising them of the fears that the bonds that were sold were counterfeits, and likewise a letter written them on that day, advising them to proceed against the parties from whom they had bought, if there was any doubt of their solvency, and on June 13th the defendants in error replied by telegram claiming substantially that they were not liable.

It will thus be seen that the plaintiffs in error lost no time in determining as to the forgery of the bonds, and advising the defendants in error of it, as soon as there was the slightest suspicion in the market, that any counterfeit bonds of such denomination were afloat.

8. Again, the contract, as interpreted by the Court below, would be one void as against public policy. That a contract to sell or negotiate forged securities would be against public policy, and one not enforcible in courts of law, is not a subject of contestation. A contract for the sale of securities, which may or may not be false, has the same inherent vice as a contract for the sale of securities which are known to be false. It would seem to follow, therefore, that any contract, by means of which the sale and disposition of forged securities would be facilitated, should meet with equal condemnation by the courts. The courts will, by adopting such a rule, prevent

what has now almost become a trade, to wit, the sale or passing of forged securities.

In *Kempson* v. *Saunders*, (12 *Moore*, 44, 49), the Court recognized this rule by saying:

"If the defendant has been imposed upon by the broker from whom he obtained the shares, he may proceed against him, and the broker has his remedy against the original projectors or subscribers, *and by rendering them liable we shall confer a great service upon the public, as it may tend to annihilate these futile schemes.* The defendant, when he professed to sell the shares, had, in fact, nothing of value to dispose of. Therefore the plaintiff, who has paid his money without consideration, is entitled to recover it back."

9. Nor can the defendants in error avail themselves of any supposed modification of the contract, because such modification was based on a direct false assertion of theirs, and therefore a fraud on the plaintiffs in error. The letter represented that "we *have purchased* the bonds from a party strange to us," thereby conveying to the plaintiffs in error that, so far as the judgment of the defendants was concerned, they placed the greatest reliance upon the bonds, and believed them to be genuine. The facts were, as subsequently ascertained by the plaintiffs in error, (*a*) that the defendants in error had not bought them at all, but had only acquired title to them conditionally; (*b*) that they had not bought them from a stranger, but had bought them from their own bank, the Commercial Bank of St. Louis, which appears to have acted either as principal or agent of Newman & Havens, a banking firm in Leavenworth. The "stranger" appears to have been the person who sold them to such firm of Newman & Havens, in Leavenworth. The falsity of such statement in the letter was not known to the plaintiffs in error until the receipt of the telegram from the defendants in error, on June 13th, 1871. (1st,

2d and 3d and 12th findings, pages 15, 16 and 18 of record.)

A renunciation of warranty made by the buyer does not bind where there has been fraud on the part of the seller.

Bevans *v.* Farrell, (18 La. Ann., 232).

There is no finding, and therefore this Court cannot presume, that the plaintiffs in error were, prior to the receipt by them of such telegram, aware of how or under what circumstances or from whom the defendants in error acquired or contracted for the bonds. All the findings, therefore, in that respect, are totally immaterial, in so far as they affect the rights of the plaintiffs in error. They are material, however, in affecting the liability of the defendants in error, in showing the falsity of the statement contained in the letter of May 25, 1871; and also (even if the Court should deem the contract to be modified by such letter), as showing, when coupled with the 8th finding (page 18 of record), that they failed to take any steps by which to avoid damages or loss when it was in their power so to do. For by the 8th, 9th, 10th, 11th, 12th and 18th findings (pages 18 and 22 of record), it appears that the Commercial Bank of St. Louis did not receive payment from Donaldson & Fraley until the 30th of May, 1871, and then Newman & Havens were advised by the Commercial Bank to that effect, and the remittance made to them; and that not *until two or three weeks after it was received by Newman & Havens from the Commercial Bank*, did Newman & Havens pay over the money to the "stranger," from whom they had bought the bonds. That is to say: assuming that Newman & Havens received at Leavenworth the remittance from the Commercial Bank, on the 31st day of May, *i. e.*: one day after the Commercial Bank was paid, the "stranger" from whom they bought was not paid by them until sometime between June 14th and June 21st. Now, on June 12th the defendants

in error were advised of the fact that Central Pacific counterfeit bonds were then out, and on the 13th they were advised that the bonds so sold by them were probably counterfeits, and it was suggested to them to trace their parties. No steps were taken (for the findings of fact disclose no finding on that subject,) by the defendants in error to try to prevent the payment over of this money by Newman & Havens to the stranger.

Point IV.

But even if the Court below was correct in its ruling that by virtue of the letter of May 25, 1871, and the acts and doings thereunder, the original contract for the sale of the bonds was modified in so far as to waive the implied warranty of the genuineness contained therein, yet the judgment appealed from cannot be sustained, because the plaintiffs in error are entitled to recover the monies paid out to the defendants, by reason of the total failure of consideration. In other words, there was a total failure of the consideration for the payment of the draft—for the recovery of the amount so paid thereby, this suit is brought. The defendants in error received $15,375 in payment for fifteen valid and genuine Central Pacific bonds; for which they in their turn delivered fifteen worthless pieces of waste paper; there was, therefore, no consideration whatever received for the money, and hence it may be recovered back.

Benjamin on Sales, pages 331, 332, 492 *et seq.* (Second Edition.)
Webb *v.* Odell, 49 N. Y., 583.

In *Young* v. *Cole*, (3 *Bingham*, *N. C.* 724), the plaintiff, a stock-broker, sold for defendant four

Guatemala bonds, and paid him the amount. The bonds, after they had been in the hands of the purchaser two days, were discovered to be not marketable. Whereupon the plaintiff took them back and reimbursed the purchaser. It was held that the plaintiff was entitled to recover from the defendant, in an action for money had and received, the amount that he had paid to the defendant.

Tindal, *C. J.*, said (page 730):

"It is not a question of warranty; but whether the defendant has not delivered something which, though resembling the article contracted to be sold, is of no value."

Bosanquet, *J.*, said (page 731):

"Here no consideration has been given for the money received by the defendant. The bonds he delivered to the plaintiff were not Guatemala bonds, but, on the Stock Exchange, worthless paper."

In *Westropp* v. *Solomon*, 8 *M. G. & S.*, 345, where there was a sale of fifty shares in a projected railway company, which shares were subsequently ascertained to be forgeries, the Court, disregarding any question of warranty, held that the plaintiff was entitled to recover, because "the question is what is the result of such a sale when the certificates turn out not to be genuine. There was no fraud or negligence on either side. *The certificates were such as to deceive everybody who had anything to do with them.* Still they were invalid. There cannot be a doubt that the vendees were entitled to recover back the money that they had paid for them."

In *Kempson* v. *Saunders*, 12 *Moore*, 44, 49, which was an action to recover for the value of the shares of the stock of a company which had never been formed, the Court (page 49) said:

"The defendant, theretore, in fact sold mere pieces of parchment, worth nothing, and obtained money from the plaintiff for a thing of no value. And it

is an established rule of law, founded upon equitable principle, that where money has been paid over by one party to another without valuable consideration, or on a consideration which fails, an action for money had and received would lie to recover it back."

See also, Kennedy *v.* Panama Mail Co., Law Rep. 2 Q. B., 580, 586, 587.
Stone *v.* Frost, 61 N. Y., 614.

Again, the thing sold, to wit: Central Pacific bonds, did not exist in the pieces of paper tendered in fulfillment of the contract. The defendants did not have in their possession the articles agreed to be sold, however much they may have believed that the articles tendered were genuine. The plaintiffs in error would, therefore, not be liable to pay the consideration, and having paid it, they can recover it back. An illustration of this rule is given by this Court in *Allen* v. *Hammond*, (11 *Peters*, 163) to be:

"If a horse is sold, *which both parties believe to be alive, and which is in fact dead*, the purchaser would not be compelled to pay the consideration."

In *Ketchum* v. *Bank of Commerce*, (19 N. Y., 499-502), the Court, per Denis, *J.*, says:

"Where there is a common mistake in respect to the existence of the thing undertaken to be sold, and which does not in fact exist, the contract for the sale is void, and any money may be recovered back in an equitable action for money had and received." Citing in support thereof *Story on Sales*, §148, and cases cited in notes 3 to 7, and other authorities.

See also Benjamin on Sales, 62.
Josling *v.* Kingsford, 7 Law Times, N. S., 790.
Shepherd *v.* Kain, 5 Barn. & Ald., 240.
Gurney *v.* Womersley, 4 Ellis & Blackburn, 133.

Point V.

The judgment of the Court below should be reversed; and as it was based on special findings of fact, this Court, if it sustains the views presented on the part of the plaintiffs in error, will not only reverse the judgment below, but direct the correct and final judgment to be entered, to wit, a judgment in favor of the plaintiffs in error for the amount asked for in their amended petition, with interest and costs.

Graham *v.* Bayne, 18 Howard, 63.

CHAS. M. DA COSTA,
Of Counsel for Plaintiffs in Error.

New York, December, 1876.

C. R. Barns, Printer, 215 Pine Street.

IN THE

SUPREME COURT

OF THE UNITED STATES,

WILLIAM R. UTLEY *et al.*, *Plaintiffs in Error*,

vs.

JOHN W. DONALDSON *et al.*, *Defendants in Error*.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

DEFENDANTS' ABSTRACT OF PLEADINGS AND STATEMENT.

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Amended petition of plaintiffs in error alleges—

That on the 25th of May 1871, defendants in error agreed and contracted to sell and forthwith deliver to plaintiffs in error at New York City 15 bonds, each of the denomination of $1000 payable in gold, with coupons attached thereto for the interest thereon at the rate of 6 per cent. per annum, payable in gold, on the first days of January and July, in each and every year until the maturity thereof, issued by the Central Pacific Railroad Company, and secured by a first mortgage on the property thereof, said 15 bonds so agreed and contracted to be delivered to have attached thereto the coupons for the semi-annual interest due thereon on the first days of July 1871, and all

other coupons thereafter to become due thereon, said bonds being known as Central Pacific first mortgage bonds, for which said fifteen bonds plaintiffs agreed and contracted to pay at the rate and price of one hundred and two dollars and fifty cents for each and every one hundred dollars of nominal value thereof to-wit, for the whole of said fifteen bonds the price and sum of $15,375.

That in accordance with their said agreement and contract plaintiffs in error paid to defendants in error on the 29th day of May, A.D., 1871, and defendants in error received from them in full payment for said 15 bonds so contracted for, the sum of $15,375, *and that thereupon* defendants in error delivered to said plaintiffs fifteen certain papers *purporting to be*, and *so by defendants represented to be said fifteen genuine bonds* of the character and denomination aforesaid *of the Central Pacific Railroad Company*, and purporting to be of series J and numbered respectively 17,476, 17,481, 17,482, 17,490, 17,496, 17,503, 17,603, 17,610, 17,611, 17,623, 17,628, 17,657, 17,620, 17,702, and 18,107, which were by said defendants delivered and by said plaintiffs received, as the genuine bonds of the character and denomination aforesaid, which by their said contract, said defendant agreed to deliver and which were received by said plaintiffs, *with the express understanding that they were the said genuine bonds* so contracted for.

That the papers so received by said plaintiffs as genuine bonds proved to be and are false forged, spurious and utterly without value.

That immediately on discovering them to be spurious, plaintiffs so informed defendants and demanded repayment of said sum of $15,375, but that defendants utterly failed and refused and still refuse to repay said sum.

That the consideration for the payment of said sum of $15,375 has entirely failed and plaintiffs have thereby been greatly damaged to-wit, in the sum of $15,375 with interest from the 29th day of May, A. D. 1871.

The *answer* of defendants in error to the foregoing amended petition denies and says it is not true, that said defendants contracted to deliver the fifteen bonds described in the petition, but admits that on or about the 25th day of May 1871, they sold and contracted to deliver to plaintiffs fifteen first mortgage bonds of the Central Pacific R. R. Co. for the price of $15,375, and that plaintiffs paid defendants said sum for said bonds; and further answering avers that before the payment of said price, defendants at the city of New York delivered to plaintiffs *without recourse upon them, the defendants, should the same not be genuine*, the said fifteen Central Pacific R. R. bonds sold by defendants to plaintiffs as hereinbefore averred, and that plaintiffs then and there did accept said bonds from the defendants *without recourse* upon them as to genuineness, and at their plaintiffs' risk as to the genuineness of said bonds.

Said answer further states, that defendants have not knowledge or information sufficient to form a belief as to whether the bonds alleged in the amended petition to have been delivered by defendants to plaintiffs *were numbered as alleged*, nor whether the same were *false, forged, spurious and counterfeit*, and therefore call for proof thereof; that defendants deny that the sum and price of said bonds was paid by plaintiffs, and that the said bonds were received by plaintiffs, *with the express understanding that they were genuine bonds;* deny, that they *represented* to plaintiffs that said bonds *were genuine*, but on the contrary defendants aver that said bonds were delivered to and received by plaintiffs *with the express understanding* that they would be delivered to plaintiffs *at plaintiffs' risk as to genuineness*, and *without recourse as to genuineness* upon defendants.

Plaintiffs in error filed their replication to the answer of defendants in error.

The only allegation of the replication not a denial of an averment in the answer is the statement—

"That at the time of the contract for the sale of said bonds,

and at the time of the delivery of the same by the defendants to the plaintiffs, the *defendants had reason to believe and did believe that said bonds were not genuine* Central Pacific Railroad bonds."

The issues under these pleadings were in brief therefore—

1st. Whether the contract was to sell and deliver the fifteen bonds as *described in the amended petition*, or as described in the answer thereto.

2d. Whether the plaintiffs in error paid the contract price before the bonds delivered by defendants were delivered.

3d. Whether at the time of the delivery made by defendants they represented the bonds they delivered to be genuine, and the plaintiffs received them with that express understanding, or whether plaintiffs were notified by defendants at the time of and before such delivery and before the payment of the purchase money, that the bonds would only be delivered on the express understanding that their genuineness was to be at plaintiffs' risk and without recourse therefor upon defendants, and whether plaintiffs thereupon accepted the delivery tendered on the terms stated.

4th. Whether the bonds delivered were genuine or spurious.

5th. Whether they bore certain numbers.

6th. Whether defendants at the time of the delivery had reason to believe and did believe that the bonds delivered were not genuine.

STATEMENT.

A jury trial having been waived in writing, the cause was heard and tried by Judges Dillon and Treat, at the March Term of the Circuit Court 1874.

The Court returned a special finding of facts in brief as follows:

That on the 24th day of May 1871, Newman & Havens, bankers of Leavenworth, Kansas, telegraphed to St. Louis, from Leavenworth, to W. Nichols, cashier of the Commercial Bank of St. Louis, as follows:

"Get rate for fifteen thousand California Central Pacific R. R. bonds, delivered to-morrow."

That this dispatch was on the said 24th day of May 1871, shown by Nichols to defendants, and defendants made a bid for said bonds. *i. e.*, 100½. That this offer was reported by telegraph to Newman & Havens, by Nichols, and was by Newman & Havens accepted by telegraph.

That on the following day, May 25, 1871, said Nichols received from Newman & Havens, from Leavenworth, a letter, dated May 24, 1871, stating among other things, "We herewith hand you bonds. Please close the transaction and telegraph us immediately. The party selling these bonds is waiting here to get the money for them. This same gentleman is *an entire stranger to us*, therefore will you be kind enough to satisfy *yourself that the bonds are all right*. We desire them sold *without any recourse on us*."

That accompanying this letter were fifteen papers purporting to be so many bonds, as in said letter described.

That Nichols, cashier, handed this letter to defendants May 25, 1871, with the bonds, and proposed that defendants should take the bonds *without recourse*. That defendants refused to take them without recourse, but said they would do this, viz.: Would give the Commercial Bank their

check for the agreed amount, $15,375, with the understanding that this check was not to be charged up by the Commercial Bank, where defendants kept their account, until the defendants had sent the bonds to New York and learned that they were (O. K.) correct. If they were found to be correct, the check was to be charged up against the defendants, and Newman & Havens to be advised, if not, the bonds were to be returned to the Commercial Bank, and the check returned to defendants.

That on the 24th day of May 1871, defendants having received invitation from Nichols to make bid as requested by Newman & Havens in their dispatch, telegraphed to plaintiffs by night dispatch, as follows:

ST. LOUIS, May 24, 1871.

"Make best bid fifteen Central Pacifics—quick."

But that after *sending* this dispatch and *before* receiving reply thereto, to-wit: on the morning of May 25, defendants were shown by Nichols, the letter of May 24th, from Newman & Havens, above mentioned, and the bonds accompanying the same.

That plaintiffs in error received said night dispatch, and on the 25th of May 1871, responded by telegraph as follows:

"NEW YORK, May 25, 1871.

"We will buy Central Pacific at 102¼."

That defendants received this dispatch on the same day, about 10 A. M., and on the same day replied by telegraph as follows:

"ST. LOUIS, May 25, 1871.

"We accept your offer, Centrals 102¼."

That on the same day (May 25th) plaintiffs in error wrote defendants a letter, saying:

"Your telegram of to-day received. You have sold us 15 thousand Central Pacific 6s at 102¼ flat."

That the fifteen bonds were delivered to defendants by Nichols, cashier of the Commercial Bank, on May 25th, and were by defendants forwarded by *Express* on the *same day*, to the Bank of North America, New York, with a draft on plaintiffs in error for $15,375—the bonds to be delivered by the Bank of North America to plaintiffs in error, on payment of the draft. By mail, mailed by defendants *on the morning of the same 25th day of May*, defendants sent plaintiffs a letter, saying:

"In accordance with your offer for fifteen Central Pacific 1st Mortgage Bonds, 102½, we replied, "We accept your offer" and have forwarded them by express to Bank North America, with draft attached for $15,375. We would further add that we have purchased the bonds from a *party strange to us*, and not having *ever handled any of the Central Pacifics*, we would sell the bonds *without recourse as to their being genuine*. Consequently please examine them, and upon being found correct, telegraph immediately ("Central all O. K.") We don't doubt the bonds, but coming to us *through strange parties*, we *use this as a precaution*, and are *not willing to take any risk*."

That this letter was received by plaintiffs in error at New York, on Monday, the 29th of May 1871, *a short time before the bonds* were presented for delivery to plaintiffs, by the messenger of the Bank of North America, and *prior* to the payment of defendants' draft for $15,375.

That on the 29th of May 1871, Monday, the messenger of the Bank of North America, with the bonds, fifteen in number, and the draft of defendants for $15,375, appeared at the office of plaintiffs in suit, in New York, to deliver said bonds and collect said draft.

That plaintiffs, on the said 25th day of May sold the bonds *to arrive*, to Rasmus & Lissignola, bankers and stock dealers in New York, engaging to deliver them four days thereafter, *i. e.*, on the 29th of May.

That when the messenger of the Bank of North America

arrived at the office of plaintiffs with the bonds and draft, it lacked not five or ten minutes of quarter past 2 p. m., after which hour, by the rules of the New York Stock Board, delivery of bonds and stocks sold could not be made for that day. That plaintiff Utley, therefore, *without examining the bonds*, went hurriedly with the bank messenger to the office of Rasmus & Lissignola to be in time for delivery that day, arriving there with the messenger of the bank. That Utley asked Rasmus to examine the bonds, saying *he had not had time to do so.* That Rasmus opened and briefly examined the bonds, said they seemed to be correct, and at request of Utley gave the messenger of the Bank of North America Rasmus & Lissignola's check for the amount agreed between them and plaintiffs, $15,403.12, which check was paid.

That on the same day, the 29th of May 1871, *and after the delivery* of the bonds as above stated, plaintiffs in error wrote and mailed to defendants the following letter:

MAY 29, 1871.

"Yours of 25th and fifteen thousand *Centrals* with draft received. The *contents all correct*, and we telegraphed you to that effect."

That on the same day, May 29, 1871, plaintiffs in error sent telegraphic dispatch to defendants as follows:

NEW YORK, May 29, 1871.

"*Centrals all right.*"

That on receipt of this dispatch by defendants on the 29th or 30th of May, they informed Nichols, cashier of the Commercial Bank, that the bonds were all correct; that thereupon Donaldson & Fraley's check for $15,375 *was charged up* and Newman & Havens were advised by the Commercial Bank, and remittance made to Newman & Havens.

That on the 12th day of June 1871, information was for the first time received *in New York or elsewhere* that there *were counterfeits of these bonds in existence.*

That on that day plaintiffs wrote and mailed a letter to defendants saying:

"Look out for counterfeit Central Pacific 6s. Some appeared on market to day."

That on the next day, June 13, 1871, plaintiffs sent a telegraphic dispatch to defendants as follows:

NEW YORK, June 13, 1871.

"Central Pacifics you sold us probably counterfeit. Trace your party. Bonds shipped to Europe. Can't hear from them for several days."

That plaintiffs in error on the same day, June 13th, 1871, wrote and mailed a letter to defendants as follows:

"We feel uneasy with regard to the genuineness of the Central Pacific 6s you sold us. The bonds have been shipped to Europe and cannot be heard from for several days. In case your parties are doubtful, it would be well to act at once, as if the bonds are not genuine. There has been *no suspicion that there were counterfeits out until yesterday.*"

That on June 13, 1871, defendants sent a telegraphic dispatch to plaintiffs in error, as follows:

"ST. LOUIS, June 13, 1871.

"We refer you to our letter of May 25th, in which we sold *without risk*. Have purchased same way from Commercial Bank and they from Newman & Havens, Leavenworth, *without risk*. Will aid you all we can if counterfeit."

That the bonds in question were sold by Rasmus & Lissignola, immediately after they purchased them, to parties who sent them to Europe, whence they were returned, declared to be counterfeit and returned to Rasmus & Lissignola, who immediately demanded repayment from

Utley, Dougherty & Scott, whereupon plaintiffs in error sent a telegraphic dispatch to defendants, as follows:

"NEW YORK, July 12, 1871.

"The Central Pacifics we bought of you are declared counterfeit. We shall look to you for indemnity."

That on the same day plaintiffs in error wrote to defendants to same effect, and also that "We do not consider that the terms of your letter of the 25th May in any way preclude us from our recourse upon you, and especially not in view of the facts disclosed by your telegram to us of June 13, 1871."

That on the 12th of July, 1871, defendants wrote and mailed to plaintiffs in error asking on what ground they proposed to look to them for indemnity.

That on the 3d of August, 1871, defendants wrote and mailed a letter to plaintiffs in error saying they were acting under legal advice and must refuse to make any assignment of claims and were not aware yet that they had any.

That thereupon succeeded a correspondence between the parties containing, on the part of plaintiffs in error, an indirect assertion of a right of recourse on defendants, and on the part of defendants a full review of such assertion and denial of any such right, and a request to begin suit to have the matter judicially determined.

That one of the plaintiffs in error, Utley, subsequently, in September, 1871, stated, when asked, in view of defendants' note of May 25, 1871, which he admitted having received, that he did not examine the bonds with care before paying for them, that he received *similar letters from the country every day* and that he supposed defendants were cautious only because they had not handled any of these bonds before.

That the money paid by Donaldson & Fraley to the Commercial Bank, and by it to Newman & Havens, was not, according to the statement of Newman & Havens to Nichols,

cashier, called for, nor paid by Newman & Havens at Leavenworth, Kansas, to the party who sold the bonds to Newman & Havens for two or three weeks after it was received by Newman & Havens from the Commercial Bank.

That *before* writing the letter of May 25th, 1871, hereinbefore set forth, and transmitting the bonds to New York, the defendants, *who had never seen any Central Pacific bonds*, took said bonds, or some of them, to two banking houses in the city of St. Louis, and asked of one of the officials of each of said banks, whether they knew about them, but were informed that they did not, as *those bonds were not known or dealt in in this market*, (St. Louis.)

That both, the plaintiffs in error and defendants in error, *were brokers and stock dealers*, the former in New York and the latter in St. Louis, and were *business correspondents of each other*.

That the bonds sold by defendants to plaintiffs in error *were spurious*.

That the identical bonds sold by defendants to plaintiffs, have been produced upon the trial by the plaintiffs, to be surrendered if they shall recover.

That the defendants, when they sold and delivered the bonds to the plaintiffs, *did not know or believe* that the bonds were *forged or spurious*, and did not know this until informed thereof *by the plaintiffs* on June 12, 1871, as hereintofore stated, and that their *only knowledge* of the bonds prior to the sale and delivery thereof, appears from the facts hereinbefore set forth.

Upon the foregoing facts the Court found as a conclusion of law, that the defendants were and are entitled to judgment, to which *plaintiffs in error duly excepted*.

The grounds for this conclusion of law were stated by Dillon J., Treat J. concurring, as follows: (See opinion made part of the record.)

From the foregoing facts the Court is of opinion that the contract by telegram was to sell and deliver *genuine bonds*,

the delivery to be *in futuro*, and payment to be made upon delivery. The tender *of delivery* was accompanied with the *express condition* set forth in the letter from the defendants to the plaintiffs, of date May 25, 1871, to the effect that the bonds, *as to genuineness*, should, *if accepted*, be at the *sole risk of the plaintiffs*, and giving the latter opportunity for examination of the bonds before accepting them; stating *the reasons* why the defendants *would not deliver the bonds*, except on the terms that the plaintiffs *should assume the risk of their being genuine*. This letter was received by the plaintiffs *before* the bonds were tendered to them, and *before* they *paid for the bonds* and telegraphed the defendants that they were *all right*.

Before the contract made by the telegram *was executed* by the delivery of the bonds, the defendants said in substance, to the plaintiffs: "We will not deliver the bonds except at your risk as to genuineness. You may examine and satisfy yourselves on this point, but we will not make any other kind of delivery."

The plaintiffs *would have had the right* to *refuse to accede* to any such *modification* of the contract made by the telegraphic dispatches, and to *have refused to accept* the delivery on the terms proposed in the letter of May 25th, and *to have held the defendants for damages* for the non-delivery in compliance with the contract.

But by *not refusing* to receive the bonds upon the conditions named in this letter, *and by acting upon that letter*, and *by assuring his defendants in response to it that the bonds were all right*, *in consequence* of which the latter *paid their vendor for the bonds*, the plaintiffs must in law be taken to have assented to the modification of the contract of sale made by the telegrams and to *have accepted the bonds in performance of it*, or, the plaintiffs *are estopped* to insist that the letter of May 25th does not affect the transaction or the rights of the parties to the contract and this though there was *no distinct consideration* for the *modification*.

The loss in the transaction has arisen from the want of due precaution or diligence on the part of his plaintiffs *after receiving the letter* to ascertain whether the bonds *were genuine*, and as *no fraud was practiced by the defendants* the loss must fall upon the plaintiffs, and this on the familiar principle that when a loss must fall upon one of two innocent parties, it must be borne by him *whose conduct occasioned it.*

In the absence of a *contract to the contrary*, it is undoubtedly true that there is an implied warranty of the genuineness and legal validity of bonds, notes and choses in action sold by a private person or public broker. But in this case the *plaintiffs assumed the risk of genuineness. This is its distinguishing character.* Such an assumption or contract *is not void because it is against public policy.*

And in our judgment it cannot be deduced from the facts that was void because of fraud express or implied.

To which plaintiffs then an there excepted.

Judgment was thereupon entered for the defendant. (See record.)

To which *plaintiffs then and there excepted.*

ARGUMENT AND BRIEF.

From the foregoing abstract of the Pleadings and Statement it is manifest that all of the issues in the cause were found in the Circuit Court *for the defendants in error*, except the issue on the genuineness or spuriousness of the bonds delivered.

The facts found by the Circuit Court in its special finding under the Act of March 1865 (13 Statutes, at page 501), are equivalent to the finding of *a special verdict by a jury*, and nothing is open to re-examination in this Court (this being a case at law) except the *rulings of the Circuit Court* on *questions of law* in the progress of the trial duly presented by a bill of exceptions.

In the case of Insurance Co. vs. Folsom, 18 Wallace, 248, this Court say: "Propositions of fact *found by the Court*, in a case where the trial by jury is waived, as provided in the Act of Congress, are equivalent to a *special verdict*, and the *Supreme Court will not examine the evidence* on which *the finding is founded*, as the *Act of Congress contemplates* that *the finding* shall be *by the Circuit Court*. * * * *Inferences of fact* must also be drawn by the Circuit Court, as it is the Circuit Court *and not the Supreme Court*, which by the agreement of parties, is substituted for a jury. * * * All matters of fact, under such a submission must be found by the Circuit Court, *and not by the Supreme Court*. * * * When a case is tried by the Court without a jury the bill of exceptions brings up nothing for revision, except what it would have done had there been a jury trial."

See also Crews vs. Brewer, 19 Wallace, 72.

There are no exceptions to the rulings of the Court in the progress of the trial on questions of evidence or law, and no objections of that character can now be heard.

Jennison vs. Leonard, 21 Wallace, 307.

The only exceptions preserved in the record are—

1st. To the finding of the Court *as a proposition of law* that the defendants on the facts found were *entitled to judgment.*

2d. To the *opinion* of the Court below.

3d. To the *judgment* of the Court below.

The second exception, "to the opinion of the Court below," cannot be entertained. The *opinion* of the lower Court is not subject to exception.

In Jennison vs. Leonard, 21 Wallace, 307, this Court says: "*In ordering judgment* for the plaintiff, certain *propositions of law are announced by the Judge* as having been *held by him.* These are important only as they necessarily and of themselves affect *the question, whether the facts found are sufficient to support the judgment,* and they are no more important than if they had not been so announced. *No specific exception* is or *can be* taken *to them.*"

The plaintiffs, by the record, presented to the Court no propositions of law to be ruled on, and an exception to the *opinion* of the Court cannot be made to stand in lieu thereof.

Insurance Co. vs. Lea, 21 Wallace, 160.

The third objection "To the *judgment* of the Court below," if it be intended to embrace the view that the facts do not support the judgment in law, is contained in the first exception. If it be intended as an objection to the judgment in its technical sense it cannot be entertained, for the reason that it does not *specify the ground of exception.*

Insurance Co. vs. Lea, 21 Wallace, 162.

The first exception, "to the finding of the Court as a conclusion of law that the defendants are entitled to judgment," is therefore the only one to be considered by this Court.

This exception is general in form, but is sufficient to raise

the legal question of the sufficiency of the facts to support the judgment.

In Jamison vs. Leonard, 21 Wallace, 307, this Court say, speaking of the facts of that case: "We are authorized by the Statute of March 3, 1865, where the finding of facts is special, to review 'the determination of the sufficiency of the facts found to support the judgment,' and we are authorized to examine no other question."

That the *special finding* in this case *is sufficient* to *support the judgment* in this case is shown by the *facts found* and *the first, second and third* Points of this brief.

I.

That a contract to sell an article or thing without recourse as to genuineness is not contrary to public policy, but binding and obligatory if the thing, at the time of the sale, is unknown to the seller to be spurious; that under such a contract, if the thing sold is subsequently discovered to be spurious, the price, if it has been paid, cannot be recovered.

See decision in this case by Dillon and Treat, J.J., supra.

Flynn vs. Allen, 57 Pa. St., 482.

Owenson vs. Morse, 7 Durnf. & East., 32 (foot of page 64).

Fogg vs. Sawyer, 9 N. H., 365.

Westropp vs. Solomon, 8 C. B., 345.

The Court below having expressly found that the defendants in error, at the time of the sale and delivery of the bonds, *were not aware and did not believe that they were spurious* and *had practised no fraud* upon the plaintiffs, the cases last cited sustain the Court below in substantially holding (by its judgment), as a proposition of law, that

property such as negotiable securities may lawfully be sold without recourse as to genuineness.

In Insurance Co. vs. Folsom, 18 Wallace, 252, this Court say with respect to the finality of the finding of fact by the Circuit Court upon a question of fraud, "Attempt was also made at the trial to set up the defense that the plaintiff *concealed material facts* from the defendant at the time the policy was granted, but the Circuit Court found that the charge was not sustained by the evidence, *which is all that need be said on the subject*, as it is quite clear that the finding of the Circuit Court, *where the trial by jury is waived*, as in this case, *is not the proper subject of review in the Supreme Court.*"

Upon principle, sales without recourse are valid. I say, Here are bonds I will sell you. I do not know whether they are genuine or spurious. I believe them to be genuine, but I will sell only at your risk. What principle of policy is there which forbids such a transaction, if in good faith? In most transactions of daily life respecting personal property there is or may be uncertainty as to title, quantity or quality. The law in every case of sale, *where there are no express conditions*, makes the buyer assume the uncertainty as to quality if he buy on his own judgment, and the seller the uncertainty as to title and quantity. This is the law, for the reason that when the vendor offers an article for sale he *impliedly represents* the *title* to be in him, and when he sells a *certain quantity*, his contract binds him to deliver that quantity; and when the vendee purchases upon personal *inspection* the law regards him as intending to buy on his own judgment. The law proceeds upon the *intention of the parties*, either supposed or expressed. When parties have, by entering into express conditions, exhibited a different intention, the law executes *that* intention and abandons the supposititious intention, unless the agreement of the parties *is interdicted by some rule of law*. Property may be *sold lawfully without warranty* as to *title*

and at the buyer's risk that the title he is purchasing is good. A may *lawfully* agree to give B so much for all the grain in a certain elevator, *whether more or less* than 100,000 bushels. And when A, upon personal inspection, buys 10,000 bushels of wheat as No. 2 winter wheat, B *may lawfully warrant the quality* to be as A supposes from his inspection. Ordinarily in the sale of bonds and like property the law implies a warranty not merely as to title, but as to genuineness. Otis vs. Cullom, 2 Otto, 449. But parties *are at liberty to agree* that the risk of spuriousness, like the risk as to title, shall be upon the buyer instead of upon the seller. Whether there shall or shall not be a warranty as to title or genuineness is wholly a matter of contract between the parties.

The vendor says, I will not part with my property except on these terms. The vendee is at liberty to reject the terms, he is under no compulsion, yet accepts them. If he make an injudicious bargain as shown in the result of the transaction, the courts can not, without proof of fraud, place him in *statu quo*. Courts were never intended to correct *errors in judgment* in those *possessing unimpaired faculties* and not the subjects of *fraud or imposition*. That is contrary to "public policy," which the courts can see will if protected and recognized by them be productive of injury to the *whole body politic*. The *public* are in no wise affected by the contract entered into between plaintiffs and defendants in error. That contract is not an *infraction of any law*, nor is it *immoral*.

In the letter of May 25, 1871, defendants say to plaintiffs: "We would further add that we have purchased the bonds from a party strange to us, and not having ever handled any of the Pacific Central, we would sell the bonds without recourse as to their being genuine, consequently *please examine them*, and upon being found correct telegraph immediately (Centrals all O. K.) We do not doubt the

bonds, but coming to us through strange parties, we use this as a precaution and *are not willing to take any risk.*"

In the face of the notification to examine the bonds, that defendants would only sell "without recourse as to genuineness," and that they were "not willing to take any risk," plaintiffs accept the bonds and pay for them. Certainly the contract arising out of these acts and this correspondence is contrary to no law, rule of policy or principle of morals.

II.

That the contract between plaintiffs in error and defendants was *not complete* by the telegram *offering* 102½ and the telegram *accepting* such offer; that the letter of May 25, 1871, was written and sent contemporaneously with the telegram of May 25, 1871 accepting the offer of 102½; and was intended, and in law is to be, *read as a part of the acceptance* of plaintiffs' offer.

There was no *meeting of minds* such as would make a binding contract, if the letter of May 25, 1871 is not so read. It is very clear from the facts found by the Court below that defendant had no intention at the time the telegram of May 25 was sent, of selling the bonds except without recourse as to genuineness.

The special finding states that "after sending this dispatch" (asking for bid from plaintiffs for fifteen Central Pacifics), "*and before receiving reply thereto*, to-wit, on the morning of May 25, defendants *were shown by Nichols* the letter of May 24 of Newman & Havens (the letter saying *they* would only sell *without recourse*). The finding further states "that defendants mailed to plaintiffs on the *morning of the 25th* day of May" (the day of sending the acceptance by telegram of the offer of 102½) "the letter notifying them that defendants would only sell without recourse and risk."

The finding further states that "this letter (of Newman & Havens) accompanied fifteen papers purporting to be so

many bonds. N. Nichols, cashier, handed this letter to defendants May 25, 1871, with the bonds, and proposed that they (defendants) should take the bonds without recourse, but they said they would do this, viz, would give the Commercial Bank their check for the agreed amount $15,075, with the understanding that this check was not to be charged up until the defendants had sent the bonds to New York and learned that the bonds were (O. K.) correct."

Therefore, it appears by the express finding of the Court that at the time of sending the dispatch accepting the offer 102½, as well as at the time of writing the letter of May 25, defendants had the letter of Newman & Havens, of May 24, *before them*, and had refused to take the bonds unless they were sent to New York and there pronounced (O. K.) correct.

The telegram and letter were both sent on the morning of May 25, and after the receipt of Newman & Haven's letter. Every circumstance goes to show that the letter was intended to be a part of the acceptance.

The Court finds that the letter of May 25 reached plaintiffs before they received and paid for the bonds. There is therefore no question but that the full terms of defendants' acceptance of plaintiffs' offer were known to plaintiffs before they accepted the bonds.

It is contended that the letter, although written contemporaneously with the telegram and intended to be a part of the acceptance, is not part of the contract because sent by a different conveyance and received subsequent to the telegram. Had the bonds reached New York *and been accepted*, after the receipt of the telegram merely *and before* the receipt of the letter, this would be true—not on the ground that the telegram expressed the contract which defendants intended to enter into; but because defendants having chosen to convey a part of the acceptance by telegram and part by mail, they must abide any untoward consequence which may ensue. But as has been said, in the case at

Bar, the full terms of defendants' acceptance reached plaintiffs before they received and paid for the bonds.

It is true that before the receipt of the letter of May 25th, plaintiffs had sold the bonds to Rasmus & Lissignola *to arrive*. But had the bonds forwarded by defendants been examined on their receipt and pronounced counterfeit, the *plaintiffs* would have been under no obligation to deliver to Rasmus & Lissignola *an equal number of genuine bonds*. A contract of sale "to arrive" falls if the thing do not arrive.

"A very common form of contracts at the present day, is a sale of goods "to arrive." This is a sale of merchandise expected from abroad, effected before arrival, *the condition being* that the thing sold shall arrive, and that if it *do not*, the bargain shall be void."

1 Parsons Contracts, 552.

III.

Should this Court rule against the second point, these defendants insist, that the letter of May 25th and the delivery tendered under the terms of the same, together constituted a proposition to modify the terms of the contract entered into by telegraph; that plaintiffs had the right in law, either to stand by the original contract and reject the proposed modification, or to accept without new or additional consideration the proposed modification; that having accepted the delivery tendered under the terms of the letter of May 25, 1871, they are in law to be regarded *as having waived any other or different performance* from that tendered, and *to be now estopped* from claiming that they did assent to the modification of the contract, or the performance tendered and received.

a. Assuming that the telegram of plaintiffs' offering 102½, and the telegram of defendants accepting plaintiffs'

offer of 102½, constituted the contract, there can be no question but that the delivery tendered under the letter of May 25th, was in effect a refusal by defendants to fulfill that contract, unless plaintiffs would agree to modify it.

"After an agreement has been reduced to writing, it is competent for the parties at any time before breach of it, by a new contract not in writing, either to altogether *waive*, *dissolve* or *annul* the former agreement, or *in any manner to add to or subtract from*, or *vary*, or *qualify*, the *terms* of it, and thus to make a *new contract*."

Gross vs. Lord Nugent, 5 Barn. & Ad., 65.
Lawrence vs. Dole, 11 Vt., 549.
Medemak Bank vs. Curtis, 24 Me., 36.

And when *before breach* a new contract is substituted for a previous one, *no consideration* is necessary if the *substituted* contract has *become executed*.

Lawrence vs. Dole, 11 Vt., 549.
Young vs. Hunter, 2 Selden, 207.

b. Plaintiffs having acted on the letter of May 25, and accepted the delivery tendered, *thereby waived a different performance*.

Shields vs. Pettee, 2 Sandf. R. 262.
Reed vs. Randall, 29 N. Y., 358.

Acceptance is a question for the jury.

Corning vs. Colt, 5 Wend. 256–7.

And "acceptance" having been found as a fact by the court below, its finding is as we have seen final.

c. Plaintiffs by accepting the performance tendered put it out of the power of defendants to make other performance.

A party whose acts prevent the performance of a condition cannot avail himself of such *non-performance* as a ground of action. His acts estop him.

Young vs. Hunter, 2 Selden, 207.
Richardson vs. Cooper, 25 Me., 450.

d. Where a loss must fall on one of two innocent persons, it must be borne by him whose conduct occasioned it.

In the case at bar defendants notified plaintiffs that the bonds came to them from *strange hands*, that they had never before handled any of them, that they, *defendants*, were *unwilling to take any risk* and would only sell without recourse as to genuineness, *consequently* to please *examine them*, and upon being *found correct* telegraph immediately (Contracts all O. K.); plaintiffs received this notification before the bonds, failed to make an examination, saying now they had not had time to do so, but telegraphed defendants and also wrote them "Centrals O. K." The plaintiffs cannot contravene the statement thus made *and relied on* without a fraud on their part and injury to another. Dair vs. U. S., 16 Wallace, 5.

The court below finds that both plaintiffs and defendants were innocent parties, and that in view of these facts the loss arising from the bonds turning out to be spurious, should fall upon the plaintiffs, as the conduct of defendants had been fair and admonitory and that of plaintiffs grossly negligent.

Defendants in error parted with their money under the same circumstances as plaintiffs, but on the faith of the acceptance of the bonds by plaintiffs under the letter of May 25, 1871, and plaintiffs' letter and telegram that the Centrals were "O. K." The rule of law under this head clearly upholds the finding of the court below.

Dair vs. U. S., 16 Wallace, 5.
Butler vs. U. S., 21 Wallace, 275.

Respectfully submitted.

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